The Sudanese Arbitration Laws in Transnational Commercial Arbitration and the Recognition and Enforcement of Foreign Arbitral Awards, under the Sudanese Disputes Settlement System

By

Salahaldin Abdelkader Jebarah

(LL.B. AL-Nileen University, Sudan, HND De Vinci College, Netherland;
LL.M. International Commercial Law, University of West London, UK)

A thesis submitted in partial fulfilment of the requirements of the University of Wolverhampton for the degree of Doctor of Philosophy

School of Law, University of Wolverhampton

DECLARATION

This research or any part thereof has not previously been submitted in any form to the University or any other body whether for assessment, publication or any other use (unless otherwise indicated). Save for any express acknowledgements, references and bibliographies cited in work; I confirm that the intellectual content of the work is the outcome of my efforts and no other person.

Abstract

The reason for writing this doctoral thesis was because of the development of the law and arbitration processes in Sudan and the issues which that process has left us with. Sudan is still going through another kind of social reform, particularly in view of the different faiths in the country, and an increasing propensity for the population to be conscious of their rights. Any single judicial process is likely to struggle to deal with such a wide range of issues, particularly in the context of increasing arbitration and transnational arbitration. The degree of uncertainty is exacerbated by the direct and indirect influence of Islamic jurisprudence on judicial outcomes.

This research establishes that if the judiciary has not changed quickly enough to cope with the demands which these factors present and the development of the economy and society could be adversely affected. Furthermore, Sudan is now looking for private foreign investors, and there are reasonable grounds to conclude that the Sudanese judiciary may be inadequate to accommodate the inevitable commercial disputes which will emerge. Whether or not an effective system of dispute settlement through arbitration can be made in Sudan, it is apparent that unless Sudan gets appropriate arbitrators with sufficient knowledge of Sudanese society and law, it will be difficult for Sudan to attract much needed private foreign investment. This research engages in a critical analysis of the development of an appropriate arbitration system in Sudan and suggests that it is a condition precedent to the successful development of the Sudanese dispute resolution system.

ACKNOWLEDGEMENTS

I would like to extend my thanks and gratitude to some people who helped, support, advised and encouraged me during my research. The guidance, valuable advice and help I received from my eminent supervisor Professor Haynes Andrew was excellent; it is hard to find words to express my debt to Professor Andrew; that is all I can answer. Also, Professor Charles Chatterjee, who was my second supervisor from the start until the end of my PhD, for his encouragement, suggestions and advice have given during my five years as a PhD student. His opinions and insights were of great value to the completion of the present research. He not only recognised I would be able to complete this research, but he also believed, more than I did, that I could get this job done. Also, I would like to thanks to Dr Metka Potocnik for her time, observations and encouragement.

The lawyers, judges, and academics scholars with whom I conducted personal interviews were of great assistance to me. Moreover, a great appreciation goes to my Sudanese friends from abroad, the hospital Doctor Amin Al-Kondy who is standing with me in the most challenging circumstances. Also, Advocates Hayat AL Hassan, Advocates Mutasim Hassan, and the Chancellor Babikir AL-Teni who were ready at all time to supply for me the materials from Sudan, when I needed to find authorities and law cases that were not so easy to get.

Unfortunately, during the preparation for the submission and discussion of this research, I lost very dear friend Mawlana/ Babikir Kbashi Al-Teni, who has been involved in this research since the first stage from the onset. Babikir was one of the closest persons to me; we share similar circumstances, feelings, academics and practical dreams. We made future plans to work together to develop laws and creating training courses for lawyers and legal staff in Sudan.

Babikir, although you are not physically here at this moment, believes you are spiritual with us, you will always remain in our hearts and minds with gratitude your love and supports

I highly appreciate the sacrifices of my wife Nahid and my children Omar, Mohammed, and Nzar for during the whole period of this study, and thanks to them for the support, love and patient during the difficult time, otherwise which the task would have been all the more difficult. In addition, I would like to thanks to my brothers, sisters and other relatives,

colleagues and friends for their encouragement. Also, I would like to thank the staff of the library of Khartoum Univesity, Alneelain University, and the Judiciary department in the Ministry of Justice in Khartoum for their help. However, any mistake or imperfection in the research is my sole responsibility.

DEDICATION

Dedicate this work to my son, Omar, and we may ask God that is being handled mercifully…

Contents

Statutes and Statutory Instruments

- Amman Arab Convention for Commercial Arbitration 1987
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) 1958
- Convention on the settlement of on investment disputes of 1974
- Convention of the League of Arab States on the Enforcement of Judgments (1952)
- International Convention on the Settlement of Investment Disputes (1965) (ICSID)
- The Optional Rules for Arbitrating Disputes Between Two States (PCA Rules) 1992
- LCIA Arbitration Rules
- Vienna International Arbitral Centre - Vienna Rules (Arbitration)
- United Nations Convention on the International Sale of Goods 1980
- UNCITRAL Model Law on International Commercial Arbitration 1985
- European Convention on International Commercial Arbitration of 1961
- International Court of Arbitration (ICA Rules)
- International Dispute Resolution Rules and Procedures ICDR
- Riyadh Convention on the Judicial Cooperation between the States of the Arab League of 1983
- Singapore International Arbitration Centre | SIAC Rules 2016
- Jordanian Arbitration Act 2001
- Saudi Arbitration System no. 46 /1404
- Egypt; Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters
- British Arbitration Act 1996

Sudan

- Anglo Egyptian Agreement for the Administration of Sudan 1899
- Attorney General Regulations 1981
- Arbitration Regulations for Engineering Disputes 2001
- Committee of Conciliation and Arbitration of the Federation of Sudanese Employers Rules 1996
- Sudanese Civil Procedure Code 1974
- Sudanese Civil Procedure Code 1983
- Sudanese Arbitration Act 2005
- Sudanese Arbitration Act 2016
- Sudan Constitution 2005
- The Investment Act, 2015
- The Governor-General's Council, Decree 1910
- The Penal Code1925
- The Civil Judiciary Law 1929
- Report of His Majesty's Agent & Consul General on the Administration and Condition of the Sudan 1905

TABLE OF ABBREVIATIONS

BOOT	Build-own-operate-transfer
ICA	International Court of Arbitration between States and Nationals of other States
ICSID	International Convention for the Settlement of Investment Disputes
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
FIDIC	International Federation of Consulting Engineers
CRCICA	the Cairo Regional Centre for International Commercial Arbitration
SBEF	Committee of the Sudanese Businessmen & Employers Federation
LCIA	Arbitration Rules of the London Court of International Arbitration, 1998
Model Law	United Nations Commission on International Trade Law Model Law on International Commercial Arbitration
UNCITRAL	United Nations Commission on International Trade Law

TABLE OF TERMINOLOGY

Al-Majlis Al –Watani	Parliament, provincial legislatures, and municipal councils
Ajaweed	A group of wise men resolve conflicts between individuals and tribes through the customs and traditions of the parties to the conflict.
Al-nizam al-aam	In Sudanese law, is referred to as public order.
Ulama	Scholars
Fiqh	Islamic jurisprudence *Shari'a* the Islamic Law
Hudud	An Islamic concept that means sentences under Shariah Principles based on the Quran and Sunnah
Hukum	Judgment
Tahkeem	Arbitration
Sunnah	"The form of the prophet". The Sunnah is performed up of the work and actions of Mohammad, the prophet of Islam. Muslims believe Mohammad's life is an excellent example for them to follow in their own lives.
Hadith	Traditions are containing sayings of the prophet Mohammad, which, with accounts of his daily practice (the Sunna), form the primary source of guidance for Muslims alone from the Quran.
Qadi Umum Sinner	The general judge of Sinnar
Ijima	The consensus among recognised religious authorities
Qiyas	In Islamic jurisprudence, qiyas (Arabic: قياس) is the method of deductive analogy in which the teachings of the Hadith are compared and conflicted with those of the Qur'an, to apply a known order to a new circumstance and create a new injunction.
Imam	Leader, Chief, guide and standard, An 'Imam` is the one that people adhere to and follow his words or actions
Majlis al-Shura	In Arabic culture, a Majlis-ash-Shura (Arabic: مجلس الشورى) is an advisory council

Sultan	the Chief of the tribe in Arabic and Sudanese societies
Mazahib	Islamic Schools is a school of thought within fiqh (Islamic jurisprudence).
Riba	The unjustified increment in borrowing or lending money, paid in kind or money above the amount of loan, as a condition imposed by the lender or voluntarily by the borrower.

Introduction

Arbitration has been a preferred method for the settlement of disputes in the international commercial world for many decades. Also, one of the beliefs of the commercial world is that arbitration is preferable to court systems in transnational commercial disputes because of its procedural flexibility. An arbitration agreement between the parties has become a standard feature in international business for settling disputes that may arise in the commercial world. The arrangement inspires confidence in the parties to engage in commerce and encourage investment with the understanding that in the event of any damage or loss, there will be a solution through arbitration.

The primary objectives of this research are twofold: to briefly trace the history of arbitration as a method of settling disputes, and to determine whether the current judicial climate in Sudan would welcome arbitration as a method of settling disputes; in particular, those of a commercial nature which the private foreign investors encounter.

Sudan is an old country, but unfortunately, the judicial institutions in it were developed in a haphazard fashion, like many other countries in Africa. Sudan has also been subject to rules of the ruling authority, namely the Ideological Military Governments,[7] at different times of its history. This period can be seen as a period of judicial chaos.

However, historically it was a common practice that all disputes of whatever nature used to be referred to the leaders of different tribes in the belief that they would be knowledgeable people, and whatever the arbitration considered, their views would be acceptable to the parties to the dispute. In this sense, an arbitration system became a common dispute settlement method in Sudan.

Then there came the colonial period, during which that judicial system was institutionalised, and the judges were required to determine disputes by applying statuary laws. At this point, it should be pointed at that the Sudanese legal and judicial system were interjected by both Sudanese indigenous law which, in fact, was very close to the Egyptian legal system, and the

[7] A succession of military governments have resulted in Sudan having been rules through a series of differing political ideologies. On November 17 1958 the army siezed power in a coup led by General Ibrahim Abboud. In turn, his rule was ended by a popular revolution in 1964. In 1968, the army again assumed power in a coup led by Colonel Ja'far Muhammad Nimeiri, which continued until 1984. In 1989 the National Islamic Front supported a military coup under the name of the National Salvation Revolution. Their rule lasted approximately 30 years and is considered one of the most corrupt military governments that has governed the country.

English common law system was superimposed on the Sudanese legal and judicial system during the colonial period.

In this connection, it should also be pointed at that the Sudanese legal and judicial system encountered difficulties by virtue of Sudan being a multi-cultural society, predominantly Muslim and Christian, with other groups including pagans. Arbitration as a method of settling disputes was not in vogue at all. In fact, in order to deal with this problem, the Arbitration Act of 2005 was enacted, but the courts applying the law were divided into two religions; Islamic and Christian. Whereas the Christian courts had supported arbitration as a method of settling disputes, the Islamic courts have not shown any enthusiasm for accepting arbitration as such a method. In essence, they had been dominated by the Islamic philosophy enunciated by the Quran. In particular, their courts seem to have relied on the ethos of that school.

However, the contemporary business community seems to have realised that the services of private foreign investors may not be attracted to Sudan unless a neutral system of settling disputes is available. Hence the need for arbitration to which private foreign investors would be parties. The Act of 2005 was put into place, and this has recently been superseded by the Arbitration Act 2016, and this statute is examined critically in chapter three of this work.

Hypotheses

1. That the Sudanese commercial system was essentially introverted in the past, because it mainly inter-reacted with other Islamic countries. Disputes used to be settled by friendly means and the idea of precedents was absent altogether:
2. Whether the current legislation in Sudan is adequate to deal with domestic arbitration
3. Whether the current arbitration legislation is satisfactory for recognition and enforcement of foreign arbitral awards.

Answers to these questions require a critical examination of the arbitration law in Sudan. Another significant issue to be answered in this research is whether the rules and procedures provided by the Civil Procedures Code 1983 and the Arbitration Act of 2016, are appropriate for bringing the Sudanese arbitration system in line with the evolution and developments that have occurred in the world of commercial arbitration. Alternately, do these laws still adhere to the traditional understanding of commercial arbitration? Do these rules and procedures

provide the flexibility needed to meet the complexity involved in domestic and transnational commercial disputes?

Since multilateral or bilateral treaties govern the recognition and enforcement of arbitral awards, other related questions are: which international or regional conventions on enforcement of foreign arbitral awards has Sudan joined; how useful and effective is the current Arbitration Act in Sudan in the context of international arbitration, and whether the current arbitration legislation is satisfactory for the recognition and enforcement of foreign arbitral awards. However, responses to these questions are not only of academic interest but also of practical interest, both for practitioners concerned in Sudan's arbitration system and for those hoping to improve it.

Dispute resolution methods have existed since the olden days; however, a systematic process, with distinct features, to resolve disputes out of court is a relatively recent manifestation.[8] Arbitration, as a method of settling commercial disputes was mostly unknown to Sudan. Instead, Sudan recognised customary law and the decisions of traditional judicial bodies.

Community elders and the wealthy and influential people in Sudanese society were committed to keeping social harmony and managing disputes. An agreement by the decision of the local powers would not be accepted today as it is generally perceived that it has no binding enforceability. However, in the past enforcement of these settlements was possible.

The first statutory provision regulating arbitration arose in Articles 136-157 of the Civil Procedure Code of 1983. Chapter IV of this Code was repealed by the Arbitration Act 2005 as the first comprehensive law that dealt with the arbitration in Sudan.

It is essential to mention that although some specific provisions for arbitration had been incorporated into the Civil Procedure Code 1983, which had advantages of simplicity and clarity; they are outdated and not compatible with the international standards. It mainly focused on domestic courts in Sudan who have the right to interfere with any arbitral process and enforcement . An example of such court control in relation to the Civil Procedure Code was in article 156 (1):

> *"Where any matter has been referred to arbitration or conciliation without the intervention of a court and an award has been made thereon, any*

[8] S. Roberts, '*Order and Disputes: An Introduction to Legal Anthropology'*. (2nd edn, Quid Pro. 1979) 70.

person interested in the award may apply to any court having jurisdiction over the subject matter of the award that the award be filed in court." [9]

There was a definite, urgent need for the development and establishment of a new law, without which there would be a struggle between the commercial world's expectations and redress provided for by law. Without this, international foreign investment would be difficult to attract.

In drafting the Arbitration Act of 2005, the legislative committee drew on the arbitration laws of other countries; notably, the Egyptian Arbitration Law Act 1994, the Jordanian law Act 2001, the Saudi arbitration system no. 46 \1404 and the UNCITRAL Model Law on Arbitration of 1985.[10] Sudan did not have substantial case law on arbitration that could provide guidance on how to draft law of arbitration. Therefore, the interpretation of the provisions by the courts was expected to be a challenge because historically, the approach to arbitration in Sudan did not perceive it as an independent means of resolving disputes.

The enactment of the Arbitration Act of 2005 was influenced by the surrounding circumstances, particularly for stimulating domestic and foreign trade and investment in the country. In light of this legislative development, the Sudanese judiciary was trying to establish the principles that helped in reorganising the role of arbitration under the laws existing at that time. Some of these policies were applied prior to the Arbitration Act 2005 being enacted. For example, the principles of the Arbitration Act 2005 permitted arbitration outside of Sudan, subject to the requirement that the Agreement of the parties residing abroad and granting awards from elsewhere would be acceptable provided it does not affect Sudanese public policy.[11]

The Arbitration Act, 2005, was expected to be different in that it would avoid the traditional close supervision of the courts and reinforce the principle of party autonomy and enforcement of the foreign arbitral award. However, many problems in the Arbitration Act 2005 emerged

[9] Civil Procedure Code 1983, Art 156 (1). This shows the overall supervision of the court where it provides the party 'interested' to refer the process to the court for examination.

[10] Egyptian Arbitration law No./27/ 1994, Sections 7(1)(a), 9, 16(2)(a)(b)(c), 43, and 47(1)(a)(b)(c). See Jordanian Arbitration Act 2001, sections 9, 11, 27 and 34. See also sections 2, 21 , 26 , 29, and 45 of the Saudi Arbitration system No. /46 /1404. Also sections 3 (a)(b) and 31 and the UNCITRAL Model Law on Arbitration of 1985

[11] See Arbitration Act 2005, Art 49

in its implementation. An example of this includes that of the confidentiality of the arbitration process and the period by which the tribunal would be required to render its award.[12]

A new Arbitration Act was passed in 2016, by an interim order of the president of the Republic of Sudan based on Article 197 of the Constitution of 2005[13]. This new law has given rise to several issues in the Sudanese arbitration system. The Arbitration Act 2016 did not differ from the previous arbitration law in form and content. However, it is inconsistent with the UNCITRAL Model Law and the international practice of commercial arbitration and was not in line with the economic, legal developments that have occurred in the region. It also repeated the same provisions, which caused great controversy. For example, the new law did not create a distinction between domestic and international arbitration[14]. Article 7 of the 2016 Act provides that:

> *"Under the provisions of this Act, the arbitration shall be international in the following cases: (a) where the headquarters of the business of the arbitration parties businesses are in two different states; (b) where the subject of dispute, included in the arbitration agreement is connected to more than one state."* [15]

However, a group of jurists[16] intervened to oppose this temporary presidential order. Indeed, many workshops and seminars have been held to comment on the defects and weakness of this law and amendments were demanded. However, the relevant authorities did not, of course, respond to these calls and there was no amendment or update to that legislation.

In general, and with the practice of arbitration since late 2005, Sudanese courts can be deemed to be supportive of arbitration. The decisions of the courts confirm this fact. However, decisions from the Court of Appeal and the Supreme Court of Sudan have focused on two main issues; the validity of the arbitration agreement and the scope of the arbitral

[12] See chapter three *'A Critical Examination of the Contents of Each of the Chapters in the current Act'*

[13] Sudan's provisional de facto Constitution is the Draft Constitutional Declaration, signed on 4 August 2019 by members of the Transitional Military Council and the Independence and Reform Powers Alliance. This replaced the Provisional National Constitution of the Republic of Sudan 2005 (INC), adopted on 6 July 200 5, which was suspended on 11 April 2019 by Lt. Gen Ahmed Awad Ibn Auf in the Sudanese coup d'état in 2019.

[14] In the third and fourth chapters of this study, the researcher explains the distinction between domestic and international arbitrability, as well as addressing the importance of distinguishing between international arbitration and domsticarbitration.

[15] Arbitration Act 2016, Art 7. This current arbitration however introduced a new mechanism for judicial review of the arbitral process

[16] In October 2017, a group of jurists and academics filed an appeal with the Constitutional Court against the Presidential Order; under grounds that the Arbitration Act 2016 was passed without the approval of the National Assembly and that this violates the Constitution under Article 9.

award under the nullity of set conditions. However, there was one case[17] where the Supreme Court rendered controversial decisions that confused the Sudanese legal community.

Sudan has ratified several significant international and regional conventions on arbitration and the recognition and enforcement of foreign awards, such as the International Convention for the Settlement of Investment Disputes (ICSID) 1965. The general studies of the Sudanese Arbitration law and relevant case law reveals that under the current Act, arbitration needs to be a more regulated and reliable system of dispute resolution resulting in binding and enforceable awards and with limited instances of court intervention. Also, the Sudanese law should recognise transnational commercial arbitration in order to manage private foreign investments in Sudan. However, the New York Convention on the Enforcement of Foreign Arbitral Awards 1958, although accepted by Sudan, was not accepted by the subsequent Sudanese regime. However, the outside world is largely unaware of this, and the UN record has not been changed to this effect. The Convention has still not been implemented in Sudan. This issue has receives attention in chapter six of this research.

It is important to mention that, at the time that the researcher commenced this study in July 2015, the existing law with regards to arbitration in Sudan was the Arbitration Act 2005. The researcher started the thesis by analysing the provisions of the existing law. However, before the completion of this research, the Sudanese government enacted a new Arbitration Act on May 10, 2016, which came into force on August 30, 2016. However, the new Arbitration Act did not address matters in more detail than its predecessor. However, it became important for the researcher to review and reflect on the new Arbitration Act in order to assess the changes and development that have been put forward in the Sudanese arbitration system to bring Sudan into line with international standards.

Research Methodology

This research has adopted the methodologies of black letter law, and comparative analysis in studying and reviewing the arbitration legislation in both Sudan and neighbouring countries such as Egypt, Jordan and Saudi Arabia to determine whether the arbitration system in Sudan is in line with those countries in the region and whether the principles the of Arbitration Act,

[17] Nile Inter Trade v. Atcoco for Advanced Trading and Chemical Works Co. Civil Recourse (2006) No. 310/2006, (unpublished) cited in Concluded Arbitral Principles (2008), Sudanese House for Books, 146–149

2016 are satisfactory for the recognition and enforcement of foreign arbitral awards. It does so by reviewing the progressing stages of the arbitration system in Sudan.

The real problem in researching this topic is that no authentic government publication exists directly on this topic, and thus this research is unable to refer to any such primary sources of information. This research, therefore, has to rely upon two sources of information; statutes, and publications in the form of books and articles.

Furthermore, the Sudanese legal system, in general, and the Sudanese classical arbitration system, in particular, may not be known to the majority of researchers and practitioners outside of Sudan. However, at present, the concept of arbitration does not seem to be significantly clear to the Sudanese judiciary. It still planned to follow that old arbitration system whereby an old knowledgeable person would settle disputes. Furthermore, Sudan is under pressure from the business community to have an arbitration system that would be acceptable to private foreign investors. This research, therefore, had no choice but to seek the opinion of eminent scholars in Sudan on this issue, which remain unpublished, and this is that third method which was applied in developing the research.

The doctrinal study also focuses on the historical background, the growth of the arbitration system and the legislation and case law relating to the arbitration system in Sudan, and whether or not they succeed in satisfying the purposes of the commercial arbitration system expected by foreign investors.

This research also examines the legal interpretations of the applicable legislation made by the Sudanese courts. It also concerns the interpretation provided by the courts and arbitration practitioners in Sudan. However, the current Act cannot operate without the support of the national courts as the arbitral tribunals are under the supervision of the statutory authority. As a result of this, the thesis provides a critical analysis of the provisions of the applicable laws, and the appropriate court decisions are examined, identifying those matters on which a general agreement exists and those on which it does not. In respect of the diverging views that exist, an effort is then made to reach an overall conclusion.

This research is studying the extent to which the Sudanese arbitration laws are harmonious with the New York Convention which is important as signatories permit the enforcement of arbitral decisons, to find answers to this obstacle, enabling Sudan to become an international centre for dispute resolution. (This is analysed later in the thesis). That will interest foreign

investors when disputes arise, they will be able to resort to arbitration. The courts will give awards effect with no review or lengthy conflicts arising between arbitration and litigation.

This research includes a broad variety of publications, including books, journal articles, online sources, interviews, and seminar papers that have been drafted on Sudan arbitration or international arbitration with views to arbitration legislation, arbitral proceedings, recognition and enforcement of foreign arbitral awards. It includes the viewpoints of experts and academic scholars on arbitration in various jurisdictions which are fairly and critically examined as sources of insight for the research.

Since Sudan adheres to the Maliki School of Islamic law and is thus based on Sharia principles,[18] the Sudanese legal system is heavily influenced by the Malki interpretation of the Shari'a and the Shari'a courts implement the Maliki doctrine. Generally, it can be stated that there is not much distinction between the Maliki doctrine of the Shari'a and other Islamic schools relating to other groups in Islam, especially the Sunnis. This is because several schools of philosophy and their related legal theories were formed in the first centuries of the Islamic era when various Islamic groups were in close contact with each other.[19]

It is important to mention some obvious limitations to studying commercial arbitration where most arbitral awards are confidential and therefore not publicly available. In addition, some difficulties confronted the researcher during several stages of this research which should be explained. In the early stage the most significant issue was the shortage of materials concerning arbitration in Sudan. Sudan is a developed country, and although there is some legal literature concerning the arbitration in Sudan, most of the available literature is in Arabic, and very little of it can be accessed online. The researcher had to interpret most of the articles, regulations and books related to the research area.

One other critical concern is that the people with whom the issues wer discussed did not include females. This is attributed to the fact that the government officers it was planned to interview were not held by women. Moreover, is better in Sudan for a man to contact other men as an approach to women may be considered improper.

[18] In Sudan and certain other places the Malki doctrine is the dominant version of Islam and has had a significant role in forming the community and rules in Sudan. However, it is not the case that the School is strictly reflected in the country's legal system. For example, loan interest, or riba, is undoubtedly forbidden in Sharia, but in some methods, it is permitted in Sudan, as in several other Muslim States.

[19] This connection of Islamic schools can be seen by comparing Maliki doctrine of fiqh, in 'Abd alAziz ibn Ibrahim, *'Kitab al-Nil'*,.Cario, Dar al fiker, (1955) 510, or Abu al-Walid al-Baji, '*Ihkam al-Fosul fi Ahkam al-Usul*'. Beirut, Dar al-Gharb al-Islami, (1982) 104.

Literature Review

Al-hadab criticised the domestic laws of the Arab world countries, including Egypt.[20] He maintained that some of the countries in the region, namely, Sudan, Saudi Arabia, and Syria, use regional and transnational arbitration systems provided in their domestic legislation.

Ibrahim Draig examined the new arbitration legislation of Sudan, underlining that[21] the enactment of a new arbitration system may be considered as a transitional stage for the Sudanese legal system. It has filled the gaps that the old rules left by providing for faster procedures for dispute settlements. The new law provides a mechanism for commercial dispute settlements between parties in Sudan and Sudanese parties and parties from abroad.

Kamil Idris claimed[22] that there were various gaps in the current arbitration law and that these can be a barrier to private foreign investors and international trade in Sudan. These shortcomings are attributed to two critical circumstances: firstly, the law derived its provisions from the traditional Egyptian Arbitration Law No.13 of 1994, which resulted in a number of controversial issues. These are reflected in the many amendments made to the arbitration system in Egypt. Secondly, he added that there was a need for Sudan to enact legislation relating to the recognition and enforcement of foreign arbitral awards in order to welcome private foreign investors.[23] However the 2016 Act did not address this issue and these criticisms remain valid for the new system as well as the previous Act.

Although some specific provisions for arbitration have been included in the current Arbitration Act of Sudan, they have essentially been borrowed from the Civil Procedure Code 1983 and the Arbitration Act 2016. These are outdated and not harmonious with international standards. Thus they fail to encourage foreign investment and transnational trade in Sudan.[24]

Although Sudan is attempting to become more competitive in international commerce, the country traditionally lacks legislation explicitly addressing arbitration. The issue of enforcement of foreign arbitral awards in Sudan used to be complex,[25] primarily because of

[20] Al- Ahadab A. Hamid, '*Arbitration in the Arab World Countries*'. (3rd edn, Kluwer Law International 2006) 9.
[21] Ibrahim Draig, '*Internal & International Arbitration*' (2nd edn, Daar AL- Nashir, Khartoum, 2014) 27.
[22] Edris Kamil, '*Practical and legal Structure and Vision on Arbitration Act 2005'* (1st edn, AL Daar AL Sudaniya, Khartoum 2006) 6.
[23] Ibid
[24] Ibid
[25] Khalil M. Ibrahim, '*Problems of Law Reform in the Sudan'* (1st edn, AL Daar AL Sudaniya, Khartoum 2013) 108.

the absence of relevant law in some of these bilateral treaties and international conventions. There were a limited number of legal provisions regarding arbitration as a dispute settlement mechanism in the laws of Sudan. There were articles 136 to 157 of the Civil Procedures Code 1983, which were the only applicable provisions for the enforcement of foreign court judgments.[26]

The dispute settlement system in Sudan, including the regulations on enforcement of awards, whether domestic or foreign, has gone through profound changes in recent years.[27] Until 2005, Sudan lacked any statutory law regulating arbitration other than the court procedure for the recognition and enforcement of arbitral awards. However, some of the provisions of the Sudanese Arbitration Act 2005 are modern and easy to understand; but it took a while for arbitration in Sudan to become operable, as it was not sufficiently well developed to handle this system of dispute settlement.

The lack of judicial rules for settling commercial disputes can be an obstacle to the growth of the transnational business, and particularly foreign investment in Sudan. The investor will be confident only if they had found that the law guaranteed real protection and remedies.[28] Sudan was thus in need of updating the arbitration system and adopting a more advanced arbitration law. Dr.Kamil Idris[29] concluded that Sudan should learn from other countries' practices in implementing the provisions of UNCITRAL Model Law. However, unfortunately, that has not happened in Sudan as yet.

Adam raised the issue of whether Sudan needs to create new legislation and to adopt the UNCITRAL Model Law for Arbitration, and examined some of the Arbitration Act 2016 provisions and provides a critique of the Sudanese arbitration system.[30] He noticed that the Sudanese arbitration existing law lacked clarity and direction; hence he suggested that Sudan should improve her commercial legislation concerning arbitration to be in line with international standards.

---

[26] Abosamra M. Taha, '*Arbitration in Boot, Sudanese Law Reform*' (AL Daar AL Sudaniya, Khartoum 2005) 6

[27] Azhary A. Sharshab, *'Authenticity of the Foreign Judgment and its Enforcement Methods'.* (AL Daar AL Sudaniya, Khartoum 2013) 19

[28] Motasim Hassan Muhagob. Paper at conference on Enforcement of Arbitral Awards, Khartoum University, held on 10 August 2016

[29] Edris Kamil , (N4) 23

[30] Mohammed Adam, 'Whether Sudan Needs to Establish her new Legislation and to adopt the UNCITRAL Model Law for Arbitration?' The Journal of Judicial Judgments. Khartoum, Vo.179, No.215, (2017).

It is important to mention that hardly any primary sources of information are available in Sudan on this topic. Thus, this would be primarily based on secondary sources of information. Some of the decisions of the courts have been referred to in this work, where relevant.

Importance of the Research

The importance of this research is that it comes after a short period from the enactment of the current Arbitration Act, where this research revealed the problems that accompanied the process and practice of arbitration in Sudan and focuses on the deficiencies in the existing arbitration law. Unlike previous research, this study examines and suggests improvements in the arbitration proceedings and legislation.

This research proposes the need for sufficient enforcement mechanisms regarding the enforcement of foreign arbitral awards, at least for developing confidence in the minds of private foreign investors. That makes this research important because it examines critically and offers answers to how may foreign arbitral awards be enforced in Sudan.

The research also makes suggestions as to how the current arbitration practice in Sudan may be improved so that eventually, Sudan may be an arbitration hub in both the Arab world and Africa. This study identifies the advantages of arbitration and its importance in transnational and domestic contracts. It is crucial because of the inherent advantages of arbitration as a dispute settlement mechanism in Sudan. With these ideas in mind, this research has been developed to provide specific new ideas as a view of improving the current Sudanese arbitration system.

Finally, this research also outlines the steps to be taken by the legislative and executive authorities regarding the enforcement of the foreign arbitral awards in Sudan.

Structure of the Research

This research has been developed over seven chapters. Chapter One provides a general historical overview of the judicial and arbitration systems in Sudan since 1504 until 2016. Facts about the early kingdoms in Sudan can be found in various historical references covering the period since Sudan was created as a united country.[31] However, despite scholars

[31] Yusuf H. Fadl, '*The Arabs and the Sudan, from the Seventh to the early Sixteenth Century*' (1st edn, Edinburgh University Press, Edinburgh, 1967) 109.

finding hardly any significant information classified from the old judicial and arbitration systems in Sudan, there exists an assumption that the judicial system in Sudan began during the era of the Islamic kingdom of Fung.[32] Accordingly, the Sudanese judicial system seems to have developed in three different stages; (a) in the era of the Islamic Kingdom of Fung or Sinnar (1504 – 1821); (b) during the eras of the ruling of the Turko – Egyptian and Anglo-Egyptian in Sudan and (c) the judicial system in modern Sudan since 1956 when Sudan was de-colonised and became a Republic.

The chapter also addresses the problems of the Sudanese judicial system in depth and importantly, provides a reason for this research. For example, the researcher highlights the difficulties causing a delay in the administration of justice and the continuing backlog of cases and largely incompetent, inadequate and out of date laws.

This chapter concludes by providing some suggestions as to how the current judicial system needs to be improved. For example, the researcher recommends the financial independence of the judiciary, correct employment process of judges and advanced and regular training for new and experienced judges. Significant to this research is the fact that the researcher encourages arbitration as a resolution to many disputes and the arbitral system rendered as a viable alternative to the courts.

Chapter two focuses on the historical growth and development of the arbitration system in Sudan. Historically, the majority of civil cases decided by the Sudanese courts were based on English law principles. The tendency to apply non-English law soon gave way to the concept of "justice, equity and good conscience."[33] Attempts to argue against this prevailing view failed, and the courts soon began to reject legal principles other than the English ones. This fact is hardly surprising as most of the Sudanese legislation was passed during the colonial period.

By contrast, the traditional arbitration system is rooted in Arabic and Islamic customs and laws. The arbitration system provides for dispute resolution through informal means. However, arbitration has faced multiple problems. The Sudanese courts have not welcomed the resolution of disputes through extra-judicial means, and the courts have interfered with

[32] Omar A. Abdurrahman, '*History and Development of the Law of Contract In Sudan (1898-2000).*' (Khartoum University Press, Khartoum. 2004) 817.

[33] K.D.D.Henderson, *Laws of the Sudan*, (3rd edn, Cambridge University Press, 1940) 290.

many awards. Besides, arbitral procedures have never met an international standard, and there have been debates regarding improving the situation.

It also provides a brief account of the attitude towards arbitration in Sudanese society, and the confidence placed in arbitration. It discusses critically how the arbitration system developed in Sudan. Each of the three kingdoms in Sudan had its system of government, trade, and commercial governance. Owing to the commercial and political relations between these states as well as the tribal chiefs (native administrators) played a significant role in the society since the tribal chiefs were regarded as the rulers and the judges within the tribal framework. Due to the lack of a modern system of government and the legislative authority, the societies tended to resolve their problems through mediation (Agaweed), which undertook to resolve the disagreement on the same issue(s) between tribes through customs.

Moreover, in Sudan, there was no concept of a rational and just procedure for resolving disputes. The early Sudanese people believed that referring disputes to Court would interrupt the stability of both societies and the national system. Also, the chapter introduces to the reader the forms of arbitration in Sudan. The current Sudanese Arbitration Act applies not only to domestic arbitration but also to international arbitration which may take place outside Sudan upon the agreement of the parties concerned.

This chapter also examines arbitration critically in the Islamic Jurisprudence. Before the advent of Islam, the Arabs lacked a structured judicial system; there was also did no stable source of legislation. Therefore, people hardly had any opportunity[25] to resolve their disputes other than going to the tribal mediators. However, when Mohamed (Peace be upon Him) emerged, the Arabs were surprised by the style and expressiveness of the rhetoric of the Quran.[26] The idea of the Islamic religion produced a transformation in some ideas, such as manners in dealings, judicial authority, and arbitration. Many other things also changed, as J. N. D. Anderson said; "Islam is a complete way of life; a religion, an ethnic, and a legal system all in one." [27]

The chapter also examines the basic concepts and principles of arbitration, the nature of arbitration, its role and the needs of modern arbitration. It starts by reviewing the definition of

[25] U.M. Barrett, '*Sharia Law and its application to International Arbitration*'. (Al-Tamimi & Company , UAE, 2012) 90.
[26] Ibid
[27] J. N. D. Anderson, '*The Modernisation of Islamic Law in the Sudan*' (1st edn, New York: New York University Press, 1960 SLJR) 292.

arbitration and its proceedings. The nature and juridical nature of arbitration have also been studied. Three main theories, namely, jurisdictional, contractual, and mixed, have been examined. It is concluded that arbitration is an institution of mixed structure, and the jurisdictional, contractual, and autonomous methods fail to consider this fully. It cannot be doubted that arbitration is a system within the law of contract and the law of procedure. As demonstrated above, jurisdictional aspects of arbitration play essential roles at different steps in an arbitral process.

Chapter three critically examines the Sudanese Arbitration Act 2016 and its impact upon the current law on the Sudanese arbitration system. It also examines the arbitration system before the Arbitration Act 2005, such as it was. The Sudan Civil Procedure Act 1983 provides the laws for arbitration (specifically Articles 136 -157). This Act mainly deals with national arbitration and permits the Court to hinder any arbitral process in Sudan.

Sudan did not have any substantial case law on arbitration that could assist in drafting the law of arbitration. Furthermore, the Arbitration Act of 2005 had to be repealed by the later Arbitration Act. However, The Sudanese Arbitration Act 2016 uses the same wording when considering the laws to regulate the recognition and enforcement of foreign arbitral awards.

This chapter attempts a critical examination of the current Sudanese Arbitration Act 2016. The analysis of the current Arbitration Act is significant as it provides an insight into the arbitration system in Sudan, stresses the gaps in the said legislation as well as justifying the call for an amendment. Also, it provides a structure by which Sudan's domestic and international arbitration practices can be compared with other countries' arbitration systems, thus drawing on any significant developments that have happened within the field of arbitration since the establishment of the Civil Procedure Code 1983. Analytically it examines the current Sudanese law of arbitration at length. Such a comprehensive examination is required to evaluate the provisions of enforcement of and foreign arbitral awards in Sudan.

It examines the arbitration system, referring particularly to the English arbitration system. This researcher considers the UNCITRAL Model Law 1985 in particular as it should be able to accommodate the Sudanese dispute settlement. This study also provides insight into developments that have occurred between 1983 and 2020.

Chapter four discusses the definition of 'arbitrability' and critically analyses the procedure for enforcing arbitration clauses and considers how international conventions regulate arbitrability and what law would be appropriate to Sudan. This chapter also identifies the different methods taken by several jurisdictions and also discusses the applicable law to decide arbitrability.

Chapter five critically examines the issue of recognition and enforcement of foreign arbitral awards under Sudanese law and identifies the main obstacles to enforcing foreign arbitral awards in Sudan. It also reviews the grounds for refusing recognition and enforcement of foreign arbitral awards in the Sudanese jurisdiction. It will show the basis upon which Sudan relies on entering international conventions linked to arbitration and explains how arbitral awards are implemented at both international and domestic levels. It also provides an examination of the implementation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 in Sudan and addresses its problems. The thesis identifies particular difficulties in implementing this convention in Sudan and suggests reforms.

Chapter six examines whether Sudan is still a member of the New York Convention, or not. The chapter also discusses the approaches of the Sudanese constitutional policies to International Conventions and Treaties. It includes an overview of the New York Convention 1958, the importance of the New York Convention, and the refusal to enforce foreign arbitral awards under the New York Convention. It also deals with multilateral conventions and treaties on arbitration agreed to by Sudan. When a dispute comes within the scope of such a treaty, its rules prevail over the provisions of Sudanese law. The ICSID Convention of 1965 and regional arrangements in the Arab world, especially the Oman Conversion 1966 and Riyadh Conversion 1983 are examined in this chapter. Chapter seven offers a conclusion and recommendations to improve the arbitration system in Sudan.

Chapter 1. An Overview of the Historical Growth and Development of the System of Judicial Settlement in Sudan

1.1 Introduction

This research examines the arbitration laws in Sudan, and because arbitration is an alternative to litigation, there will be a brief study of the judicial system in Sudan and the development of the judiciary through history up to the modern-day. This will put the research in that context. Although Sudan became independent in 1956, its legal and administrative history may be traced in the history of the country.

Sudan's long history depicts considerable social diversity, including many religious, ethnic, and socioeconomic groups. The country's culture and religions have always influenced the laws of Sudan. Both decree-laws and customary law govern the judicial courts, whereas local chiefs, named *Sultans*, resolve disagreements between the community members through arbitration or conciliation[1] and provide informal community service. Customary laws contain informal dispute resolution systems that are typically based on local customs, tradition, or tribal systems of justice. Sudan's ethnic culture and religion gave rise to customary laws and practices. It is diverse and varies from tribe to tribe and community to community.[2]

Fundamental issues of access to resources, economic prospects, and power against the background of such diversity have unfortunately created some of Africa's longest-running conflicts since the country became independent in 1956. This first chapter briefly describes Sudan's political history. Also, it examines the historical background to the development of a legal system in Sudan as part of the mission for justice, the rule of law and fundamental rights, in addition to providing an overview of the origins and sources of law in Sudan.

In this chapter, the researcher attempts to justify the need to devise a new disputes settlement system in Sudan, and so this research critically examines some of the main problems of the

[1] Agreement for the Administration of Sudan, dated 19 January 1899, in *The Laws of Sudan*, (4th ed., 1955, Vol. 1, Title 1, Subtitle 2, (7)), (from now on "the Condominium Agreement").
[2] J. N. D. Anderson, '*The Modernisation of Islamic Law in Sudan*' (1st ed, New York University Press, 1960) 292 and Carolyn Fluehr-Lobban, *Islamic Law and Society in the Sudan*, (London, Routledge 3 December 2010) 209

Sudanese court system, such as the poor work environment of the courts, and an unacceptable judicial system that has failed to protect the rights of the Sudanese people.

This chapter mainly utilises historical research and analyses documents. However, the researcher found that this is not sufficient to have a precise idea of the matters related to the judicial system in Sudan, particularly those of that kind, which relate to the practice of litigation in the last era of the judicial history of Sudan. As previously mentioned, it is due to the deficiency of materials related to the legal and arbitration Systems in Sudan.

This chapter has been divided into three stages to examine the judicial system in Sudan. The first stage briefly highlights and examines the judicial and legal systems in the era of the Islamic Kingdom of Fung, otherwise known as Sinnar (1504 – 1821). It describes its traditional judicial system and customary arbitration as well as the amicable mediation and reconciliation methods. Prior to Sudan being colonised, Sudan had her traditional means of settling domestic disputes. The second stage represents the period of the rule of the Turko – Egyptian and Anglo-Egyptian empires in Sudan (1899–1956); and the third the judicial system in modern Sudan. The chapter also highlights the several courts in Sudan and briefly discusses the range of each of their jurisdictions. In relation to the research question ie, arbitration, the researcher concludes this chapter by providing recommendations to improve the performance and standards of the courts.

1.2 The Background to the Sudanese Judicial System

The facts regarding the early kingdoms of Sudan can be found in various historical sources.[3] However; scholars found little meaningful information which could be extracted from the old judicial or legal system in Sudan, but the fact remains that it can be assumed that the judicial system in Sudan began during the Islamic kingdom of Fung. [4]

[3] Makki Shebaika, '*The Sudan over the Centuries, 'Al-Sudan Abr A1-Quroon'* (2nd. Edn, Beirut. - Dra El-nasher, 1965) 23.

[4] Omar A. Abdurrahman, '*History and Development of the Law of Contract In Sudan (1898-2000)'*, (Khartoum University Press, 2014) 36.

Throughout these periods, the legal and judicial system used in Sudan had three independent branches.[5] The first was the Shari`a law, applied by the Shari`a courts to Muslims on personal matters; the second was the regional laws and custom, concerning both criminal and civil interests, applied by Native Courts and High Majesties' Courts. The third was mainly English law as received and applied by civil courts authorised under the Civil Judicial Ordinance and criminal courts established under the Criminal Procedures Code 1900.[6] That did not help build a unified judiciary. In fact, these judicial bodies were exercising their functions as part of the executive because there was no independent judiciary in Sudan during this period.

The need for an independent judiciary was proposed in the early years of the Sharia era. The legal secretary to the Sudan Government, E. Bonham-Carter,[7] stated in 1905 that:

> *"The time has, in my opinion, now arrived when a definite step should be taken towards the separation of the judiciary and the executive…"* [8]

However, Sudanese society consisted of a combination of tribes and groups, the vast majority of whom are of Arab origin. Like all human communities, disagreements and disputes took place owing to conflicts of interest between the tribes and the groups. These disputes necessitated reviewing the contemporary judicial system to recognise those rights and preserve the interests of the individuals[9]. As the Sudanese tribes have an Arabic and Islamic background, disputes were settled by an application of the Shari law.

1.3 A Brief Account of the Judicial Settlement Procedure in the Islamic Kingdom of Fung /Sinnar (1504 – 1821)

The Kingdom of Sinner is generally seen as the beginning of the Sudanese judicial system,[10] although history does not provide any precise information regarding the judicial systems that

[5] Abdullah A Ibrahim, '*Manichean Delirium: Decolonizing the Judiciary and Islamic renewal in Sudan, 1898-1985',* (Leiden University Press, 2008) 520.
[6] Ibid
[7] Report of His Majesty's Agent & Consul General on the Administration and Condition of the Sudan (Sudanese Archives, 1905), 78
[8] Ibid
[9] Youssef H. Fadul, paper 'Sudanese Identity, Features and Roots: Remarks on its Development and Vision of its Future'. Seminar held in Khartoum, in Al-Ez Ibn Abdul Salam Centre for Arab, Islamic and African Studies, (May 2014)
[10] Makki Shebaika, (n3) 41

preceded it. Earlier, there had been different types of tribal rulings which controlled Sudan. However, there appears to have been an absence of what would now be regarded as regulations and regulatory forms[11]. The Chief of a tribe did have an absolute power to regulate and settle disputes between individuals. Disagreements that arose between the members of a tribe were customarily resolved by referring them to the leader[12]. The leader's role was to try and settle disputes amicably between the parties. The leader endeavoured to resolve disputes in such a way as to uphold solidarity between his people, on the one hand, and to maintain his moral position on the other.[13] Moreover, because of the commercial and trading relations between these tribes, all parties found it necessary to settle their disputes arising out of those trades on a co-operative basis.[14] Accordingly, the Sudanese commercial community developed a tradition of settling disputes in a manner akin to the modern processes of conciliation and mediation.

The emergence of the Kingdom of Fung ushered in the beginning of the new judicial systems for the contemporary Sudanese society[15] based on the framework of Islamic jurisprudence because, by this stage, Islamic law was obligatory to every Muslim. The appropriate form of Islamic jurisprudence was closely associated with the doctrine of Imam Malik. The Islamic judicial system became a significant feature of the kingdom of Fung, and an essential pillar of the running of the kingdom.[16]

The primary source of the law was Islamic jurisprudence; the principles of the Quran, judicial precedents, equity, justice, and good conscience past form the official sources of law. During that era, the first Supreme Court was established, and it sat in the capital, Sinnar, headed by

[11] J. N. D. Anderson (n2) 320

[12] B.A. Ogot, *Chapter 7: The Sudan, 1500–1800*". *General History of Africa* (2nd edn, Berkeley, CA: University of California, 1999) 89–103. He also commented that :''The Funj Sultanate of Sennar (sometimes spelled Sinnar), known in Sudanese traditions as the Blue Sultanate, because of the Sudanese convention of referring to black peoples as blue, (*Arabic: السلطنة الزرقاء; As-Saltana az-Zarqa* . This was a sultanate in the north of Sudan, named Funj after the ethnic group of its dynasty or Sinnar (or Sennar) after its capital, which ruled a substantial area of northeast Africa between 1504 and 1821.''

[13] Faisal Kutty, *The Shari'a Factor in International Commercial Arbitration*, (28 Loy L.A. Int'l & Comp. L 2006, Rev.) 565-589.

[14] Bashar H. Malkawi, *Using Alternative Dispute Resolution Methods to Resolve Intellectual Property Disputes in Jordan*. (CWSL Scholarly Commons, 2012) 141.

[15] H.A. MacMichael, *The Chronology of the Fung Kings*, (1st edn, Cambridge University Press, 1922, 431).

[16] J.N.D. Anderson (n11) 203

the judge called the General Judge of Sinnar (Qadi Umum Sinner).[17] The establishment of the Sinnar Supreme Court is considered to be the first important step forward, which continued to be involved in local issues referred to the Federal Court System.

Also, there was a transformation of some local courts (similar to an amalgam of the English Magistrates and County Courts), with judges sitting in several towns and cities in Sudan. These courts had jurisdiction limited to petty theft cases and civil actions, regarding personal status, and written arguments to the local Chief, declarations, and legalisation of documents. As to the relationship between the local kingdom civil courts and the Federal Supreme Court,[18] they saw themselves as operating within a federal legal system. Throughout this period appeals were submitted through the local Court of Appeal to the Federal Supreme Court in Sinnar. The system also established a lower prosecution court called the White Sharia Court, or rural tribunal, which was confined to the towns and countryside and specialised in resolving the simple disputes that arose in the rural community, such as those of the disputes arising between the farmers and herders.

The Sharia White Courts were the secular and religious societies of the Islamic 'society' of the kingdom. Accordingly, the judges of the Sharia Court were primarily concerned with the clarification and application of Islamic Jurisprudence.[19] The White Sharia courts, however, were also under an obligation to apply the provisions of the federal and local legislation. However, arbitration was usually applied to disputes regarding family and land issues.[20]

The *Majlis al-Shura* or Consultative Council issued safeguards designed to ensure judicial independence in the application of the administration of justice, including guarantees related to the selection, appointment, and rank of judges. The person who applies for the post of a judge needed to be honest and had to meet the necessary conditions which are knowledge of religion, history, society, and the laws.[21]

The monarchy of the Islamic kingdom of Fung was not autocratic, but it took the *Majlis al-Shura* or Consultative Council as a legislative body that advised the King on issues that were

[17] Abdullah A Ibrahim, (n5) 219
[18] Ibid 529
[19] MacMichael, (n11) 208
[20] Ibid
[21] Youssef H. Fadul (n9)

important in ruling the kingdom[22]. It is a modern form of a traditional Islamic concept; an accessible leader consulting the knowledgeable and experienced elders or community leaders, which had always been practised by the Kingdom's ruler.

1.4 The judicial system in Sudan under Turko-Egyptian and Anglo Egyptian rule

No recognisable civil or commercial law existed in Sudan until the end of the old kingdom.[23] The United Kingdom was in charge of legislation in the newly established Anglo-Egyptian Sudan, and the process of legal development in those areas came about as a result. The Condominium Agreement of 1899 granted the supreme military and civil command in Sudan to one officer, called the Governor-General of Sudan.[24]

When colonialism acquired a political dimension, the British managed to distance their European competitors from the region. The Anglo-Egyptian rule gave the British the basis for interference in the affairs of the courts, and progressively to gain control of all the North and South of Sudan. The Governor-General of Sudan was assigned the power to make laws[25,] and Egyptian laws were mainly applied in Sudan.[26] Besides, the jurisdiction of the Egyptian Mixed Courts was explicitly excluded from being extended or accepted in Sudan.[27]

The British strategy was to establish a modern legal system, and to this effect, Article 5 of the Condominium Agreement 1899 of Sudan provided that:

[22] Abdullah A Ibrahim (n5) 213
[23] Makki Shebaika (n3) 76
[24] The Anglo Egyptian Agreement for the Administration of Sudan 1899 Article 3. All Governors General, Starting from Lord Kitchener, who led the re-invasion of Sudan; to Sir Robert Howe, who handed the country to the first national government, were British. Historically, all Governors-General of Sudan were British.
[25,] See the Condominium Agreement 1899 Article IV which provided: "Laws, as Orders and Regulations with full force of law, for the good government of the Sudan, and for regulating the holding disposal and devolution of property of every kind therein situate may from time to time be made altered or abrogated by Proclamation of the Governor-General…"
[26] See the Condominium Agreement 1899 Article V, which provided; "No Egyptian Law Decree Ministerial Arrete or other enactment hereafter to be made or promulgated shall apply to the Sudan or any part thereof, save in so far as the same shall be applied by Proclamation of the Governor-General in manner hereinafter provided".
[27] See the Condominium Agreement, Article VIII that provided; "The jurisdiction of the Mixed Tribunals shall not extend, nor be recognised for any purpose whatsoever, in any part of the Sudan, except in the town of Suakin". The provision for the exception of Suakin was abrogated by a "Supplemental Agreement for the Administration of the Sudan."

> *"No Egyptian Law, Decree, Ministerial Arete, or another enactment hereafter to be made or promulgated shall apply to Sudan, or any part thereof saves in so far as Proclamation of the Governor shall implement the same- General in the manner hereinbefore provided".*[28]

Also, Article 6 of the same Agreement stipulated that:

> *"…Shall be and remain under martial law until otherwise determined by Proclamation."* [29]

The most critical motives that made the British administration avoid the Egyptian legal system in Sudan were the transgressions and abuses of mixed courts. This system exempted citizens of European countries, who were to face trials in front of the mixed courts. Thus, this system was designed to exempt Europeans from the *Hudud* sanctions of amputations, and whipping.[30]

The first codification of the law in Sudan was the Sudanese Penal Code of 1899; This Penal Code was drafted by Lord Macaulay of India, which suited the needs of the Sudan.[31] In the same year, the Criminal Procedure Code was also promulgated. The 1925 Penal Code developed over the years to become part of the law of Sudan. The judges in their application of the law took into consideration the social elements of Sudan and its cultures, and that consideration was reflected in the precedents, which formed an important part of Sudanese law until 1983.[32]

The adoption of the Indian model was based on the assumption that the social structure and lifestyles of India were closer to Sudan than those of England; however, the targeted harmony between the law and the domestic social morals presented a problem.[33] The primary examples were the prohibition of slavery, which was a recognised institution in the agricultural

[28] The Condominium Agreement 1899 Article 5. This information was collected from the archives of the Sudanese Ministry of Justice.

[29] The Condominium Agreement 1899 Article 6

[30] Egon Guttmann, 'The Reception of Common Law in the Sudan'. International and Comparative Law Quarterly, (1957), Vol. 6 405.

[31] Ibid

[32] Lutz Oette *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, (3rd edn London, Ashgate Publishing Ltd, 28 Feb 2013) 43.

[33] Egon Guttmann (n8) 406

communities of Sudan, and the ban of the paranoiac type of female circumcision (FGM), which many Sudanese did not consider wrong.

However, the new system of law was inappropriate as the Penal Code inflicted a 'moral injury' on the Sudanese people it because maintained a relaxed attitude towards alcohol, gambling, homosexuality, and apostasy against Islam.[34] Furthermore, the Penal Code also included undiscoverable crimes, such as the temptation of hatred against the government. There were also crimes based on political activities, outlined in the anti-subversive activities law[35]. It could be argued that the new law contained clauses that violated and undermined the freedom of the individual and prevented the association and freedom of expression of the Sudanese people.

Throughout this period, the Sudanese criminal legal system was developed, and it was primarily based on English criminal law. Under the Code of Criminal Procedure, six classes of criminal courts were constituted; the Major Courts, Minor Courts, Courts of Magistrates of the first class, Courts of Magistrates of the second class, Courts of Magistrates of the third class, and Benches of Magistrates. Each class of courts had specific powers under the Code.[36] It is worth adding that while in the field of criminal law the Indian experience of codification of both practical and procedural law was resorted to, this was not the case in the civil law field, as no codification had existed in the whole civil law field in Sudan.[37]

The civil code was established in 1900, and was re-enacted in 1929, and became official decree regarding the civil law in Sudan throughout this period. The Civil Justice Act was founded for the procedural and administrative aspects of civil law.

On 24th January 1910, the Governor-General's Council Decree was passed, under which a Council composed of four ex-officio members, namely the Civil[38], Financial and Legal Secretaries and the Military, together with other additional members ranging between two

[34] Abdullah Ibrahim, (n13) 533

[35] Faisal Kutty (n11)

[36] Omer A. Abdurrahman (n5) 223

[37] Egon Guttmann, (n8) 412

[38] J. Hyslop, '*The Sudan Story, Chapter "The Avenger Brings Peace*", (The Naldrett Press, London, UK 1952, 413). He also noted that: 'In the condominium's first period, the governor-general and provincial governors applied a high standard in governing Sudan. After 1910, however, an executive council, whose approval was needed for all legislation and resources affairs, served the governor-general'

and five in number, was were to be appointed by the Governor-General.[39] The Council had two primary tasks to conduct, first, to create decrees, laws and regulations; to pass the annual budget and to do any other thing it was required to do by the provisions of any ordinance[40]. Second, it was allowed to act as an advisory council to the Governor-General in all other matters which may be submitted to it.

However, the control was exercised by the Governor-General to reach the decisions of the majority of the Council, or to suspend the process thereof pending a reference to the British Consul-General in Cairo and the Egyptian president of the Council of Ministers.[41] Moreover, the Sudanese people were not consulted directly or indirectly to contribute to the arrangements made between the two colonising powers regarding how the country would be ruled, which compares with the situation in other African countries which were under British rule where these rulers reached agreements with local leaders.[42] Besides, compared to the situation in other African countries, the obligation that any law in those territories should not contradict any British decree extending to the relevant territory did not exist in Sudan. That was due to the unique position of Sudan as a condominium under the joint rule of two colonising countries, which consequently lacked a provision for English statutes extending to Sudan.

Throughout this period, there existed in Sudan a legal system with three different divisions, with each division working almost separately from the other. The first was the Sharia law, practised by Sharia courts in relation to Muslims on personal issues; the second was domestic law and custom concerning criminal and civil issues, applied by Native Courts and Chiefs' Courts[43]. Finally, the third was mainly English law applied by civil courts established under the Civil Justice Decree and Criminal courts published under the Code of Criminal Procedure.[44] This system did not, however, help establish a federal judiciary. That was the situation while the need for an autonomous judiciary existed, and the legal secretary to the

[39] See Article 2 of the Governor-General's Council Decree 1910
[40] See articles 4, 5, 6,and 7 of the Governor-General's Council Decree 1910
[41] See articles 9 and 10 of the Governor-General's Council Decree 1910
[42] Antony N. Allott , '*New Essays in African Law*' London Butterworth, (1st edn. Cambridge University press 1970) 12 And El-Fahal El-Tahir Omer, *The Administration of Justice During the Mahd*iya, (Dar Al-Nasher Publishers, Khartoum, 1964) 202.
[43] Ibid 157
[44] M. I. El Nur, '*The Role of the Native Courts in the Administration of Justice in the Sudan'*, (Khartoum, Library of the Ministry of Justice Press, 1960).

Sudanese Government, E. Bonham-Carter,[45] as mentioned above, had specified in 1905 that he believed the judicial and executive powers should be separated.

The British colonial administration separated the Islamic judiciary from the civil judiciary, which dealt with civil and criminal law, and left issues concerning the personal status of Muslims to the laws and provisions of Islamic law[46]. Moreover, the supervision was assigned to their Egyptian allies, and the English monopolised the post of president of the judiciary until 1956. At the time, the judiciary became part of the executive branch. It did not provide for the independence of the judiciary until after the independence of 1956 and the adoption of the interim Constitution, which granted the independence of the judiciary and its separation from the executive authority and the legislative authority.[47] Although several developments and changes occurred since the British established the legal and judicial systems of Anglo-Egyptian Sudan, the contemporary legal system remained.

However, the British administration in Sudan did not have a regular legislative policy but was concerned with that version of the legislation which served their economic interests[48]. Therefore, the British administration was not interested in laws relating to civil commitments, tort liability law, insurance, and other basic rules that could apply in practical life. The colonial structure in Sudan rarely focused on anything other than 'the primary tasks of law, order, and tax collection'.[49] Daly stated that the greatest achievement of the Condominium regime was 'order',[50] but one would assume that by that he meant the elimination of challenges to the state which would take place, rather than any pervasive policing of society.

The overwhelming military power of the colonial state ensured that there were no significant rebellions against it after the 1920s, but this did not guarantee the most extensive regulation of Sudanese society.[51] Moreover, during the colonial period, Britain had treated Sudan as a

[45] Egon Guttmann, '*The Reception of the Common Law in the Sudan'.* (Cambridge University Press 1957) 407.
[46] El Mahdi, M. Saied General *Survey of the Sudan Civil Justice Ordinance 1900*, (Khartoum Daar El-Nashir Publishers 1969) 125
[47] M. I. El Nur (n44) 80-88
[48] Saeed El Mahdi (46) 182
[49] Peter Woodward, '*Sudan, 1898-1989: The Unstable State*' (London: Lester Crook Academic Publishing and Lynne Rienner Publishers Inc. 1990) 231
[50] M. W. Daly, '*Empire on the Nile: The Anglo-Egyptian Sudan, 1898-1934'*, (3rd edn. Cambridge University Press, 2008) 451
[51] H.A. McMichael (n4) 438

source of raw supplies and a market for British manufactured goods[52]. The judiciary in Sudan was able to rule in civil cases for sixty years, which followed the English system.

On the other hand, it seems that the legal system, which was established by the British administration, worked well in contributing to and maintaining justice for the majority of the Sudanese, and this was a significant step forward by all accounts for a country that did not have a regular and wholly legal and judicial system[53]. Sudan has a complicated legal and judicial history, and yet, eventually developed a single unified form of law.

As a consequence of the codification system since the 1900s, the Sudanese legal system incorporated the basics of English law, Islamic jurisprudence, and customary laws extracted from Egyptian laws and other Arab regulations[54]. These fundamentals can be seen in Sudan's legislation (the Sudan Constitution 2005, the Civil Code 1983, the Criminal Code 1974, Company Law 2015, the Arbitration Act 2005, and the Personal Status Law 2009). Meanwhile, the pre-Anglo-Egyptian Agreement which provided common local standards and included informal conciliation and arbitration techniques continued to resolve the majority of disputes and other legal issues throughout the country (such as tribal conflicts, family problems, traffic accidents), despite the officially published laws, and customary local rules.[55] Considering that nearly half of the Sudanese are unable to access the official courts, or for the other reasons adhere to local community customary rules, or informally administered Islamic principles, the practical reality is that the state law is not always regarded as the highest mechanism to resolve disputes in Sudan[56].

1.5 The Judicial System in Modern Sudan

Sudan achieved full independence and sovereignty after the governments of Egypt and Great Britain signed a treaty guaranteeing Sudanese independence in October 1956. Since then, Sudan has taken significant steps to establish its political, administrative, and judicial systems. Several regulations have been passed to transform Sudan and her tribal communities

[52] Ibid
[53] K.D.D. Henderson, '*Survey of the Anglo-Egyptian Sudan, 1898 – 1944'*, (vol. 1, Title 1, Subtitle 23`d ed., Longmans, Green & Co 1946) 99
[54] ibid
[55] J. Hyslop, J (n38) 121
[56] Makki Shebaika (n23) 433

into a nation state. In addition to the developed provisional constitution, fundamental laws have been formulated with the primary purpose of establishing and regulating the judicial system, most importantly, the Sudanese Penalties Code, Criminal Code, and the law establishing the National Courts, Constitutional Court, and the Law of Courts of Justice. Yasmine Sherif noted that:

> *"Judiciary structures are more developed, but the independence of the judiciary seems to have been compromised - as evidenced by the arbitrary dismissal of qualified judges, attorneys-general and law officers. Existing legislation fails to guarantee the full spectrum of human rights and fundamental freedoms, while military decrees and emergency laws undermine those rights currently protected by statutory law."* [57]

Indeed, although the Constitution provides for an independent judicial system, the judiciary is mostly servile to the president, or the security forces, especially in matters of crimes against the state and influential people in the ruling party.[58.] It is an ugly fact that Sudanese courts of justice have differing operational difficulties, arising from an inadequate framework, an insufficient number of judicial tiers and unqualified staff, delays in the hearing and judgment of civil, criminal and selecting cases and appeals, low salaries, and the lack of a substantial research resource to settle cases. The judiciary is also troubled by severe ethical problems, including a biased form of appointment of judges. The judiciary in Sudan has become an essentialy unpredictable group of people. A good example of this would be the case of the Advocate: Khalid H. Abu Arab v. the judge: Khalid Abdullah al Tayeb.[59] The facts of the case are that an argument arose between the Advocate and the judge inside the courtroom following the Advocate's objection to the court proceedings in which he was representing one of his clients. The legal objection raised the judge's indignation, and he rendered an immediate judgment against the Advocate. The judge decided that the Advocate should be given 40 lashes and a heavy fine. It is worth mentioning that the judge directed the policemen who guarded the courtroom to whip the Advocate and arrest him immediately.

---

[57] Yasmine Sherif, 'Promoting the Rule of Law in post-conflict Sudan', available at https://www.fmreview.org/sudan/sherif Accessed March 2017

[58] This refers to a situation where security forces and police officers take the law into their own hands and beat, arrest, and kill innocent people for fabricated crimes without recourse to the law or judicial system of the State. This may include shooting an innocent in the public street. see the Country Reports on Human Rights Practices, SUDAN Department of State U.S. - available at http://www.state.gov/g/drl/rls/hrrpt/2004/41628.htm Accessed March 2017

[59] The Advocate Khalid H. Abu Arab v. the judge Khalid Abdullah al – Tayeb (5th July 2015) case No 409-324 C.L the Court of the First Instance Khartoum.

The Advocate submitted a claim and also filed a complaint to the head of the judiciary against the judge. No decision has been made regarding the complaint or the criminal case, as far as public or document is considered, as yet. Furthermore, *Mawlana* Ali M Hassnain stated that:

> *"In a developing and advanced economy, it is well known that the availability of a quick, effective, and efficient means of dispute resolution is a necessary factor in the growth and encouragement of foreign investment and commerce."*[60]

A flawed judiciary, therefore, influences the growth of any economy since foreign investment remains a significant supporter of economies, particularly in developing countries.[61] Most foreign investors are wary of a state where their lawful rights cannot be secured.

The Constitution of the Republic of Sudan, 2005 (Act 3 of 2005 the Constitution), is the supreme law of the Republic of Sudan and provides, among others, how the three divisions of the government, that is, the Legislature (Parliament *Al-Majlis Al -Watani*, provincial legislatures, and Municipal Councils), the Executive Authority and the Judicial Authorities should practise their affairs. Chapter II of the Constitution structured the national legislative process and determined that Parliament is the national legislature of the Republic.

Sudan published her Civil Procedure Code in 1983, forming a significant development in Sudanese law in comparison with previous periods. This development resulted from the adoption of Chapter IV of this Code, which was repealed by the Arbitration Act 2005 as the first law that dealt with arbitrations in Sudan. It is important to mention that although some specific provisions for arbitration have been included in the Civil Procedure Code 1983, they are outdated and incompatible with international standards; the statute mainly focuses on domestic arbitration and allows the Court to interfere in any arbitral process in Sudan. Thus, it did not encourage foreign investors to use the methods of alternative dispute resolution in

[60] Ali M Hassnain , 'Independence of the Judiciary in Sudan: A image or truth' (2015) 4(6) Sudanese Journal of Public Law and Politics Research 63, 67

[61] Aitken, B. and A. Harrison "Do Domestic Firms Benefit from Foreign Investment? Evidence from Venezuela", American Economic Review, (1999), Vol. 89, 600-609

Sudan. In contrast, as the Sudanese community, commercial activities, and the labour market continued to grow, the concept of litigation rather than arbitration progressed.

The Sudanese judicial system is mostly based on English legal principles. Judges are aware of the civil law system's concepts, and despite the large case volume accumulated, and laborious proceedings, the principles of due process and judicial review are usually valued and respected.[62] The access to justice is an essential principle of the Sudanese legal system. According to Article 131 (2) of the Constitution, judges will be appointed permanently, not excluded or dismissed without sustainable causes, which are incompatible with the terms of the elected judges stipulated by the law. However, this provision did not prevent the current regime from a general purge of politically hostile judges and other government officials in 1989.

Moreover, the situation has still not changed. The Constitution of 2005 provided the independence of the courts and increased that power of constitutional rights and procedures thereto. Judges should also be independent of the government and enjoy judicial protection according to Article 132 of the Constitution of Sudan. The improvement of the legislative and administrative systems will direct the formation of the Sudanese judicial system[63]. Also, the period of verbal judgments has ended, and some principles of Shari'a and judgments have been coded as officially legal rules. The Sudanese Judiciary is comprised of secular and religious courts, administrative courts, a Supreme Constitutional Court, penal courts, civil and commercial courts, personal status and children and family courts, national security courts, labour courts, as well as other specialised courts and circuit courts.

The arbitration of disputes and the administration of formal and informal laws takes place in different forms throughout Sudan, depending on ethnic, religious and political factors. Judicial courts are provided for in both statutory and customary law, while informal community practises also rely on local leaders, known as Sultans, to resolve disputes between community members. Indeed, the judiciary depends heavily on common justice to settle conflicts by mechanisms of conciliation and the application of tradition. Customary law typically consists of non-state conflict settlement structures that are mostly focused on local customary, constitutional or territorial justice systems. In view of Sudan's ethnic and religious

[62] Omer A. Abdurrahman (n5) 27
[63] Constitution of Sudan 2005, Art 132

diversity, customary laws and practises vary from tribe to tribe and community to community. Case documentation of rulings by the formal courts is published in the Sudan Law Journal and Records, while the law is published in the Sudan Gazette.

The judicial system has become more established, but the independence of the judiciary seems to have been compromised, as demonstrated by the arbitrary dismissal of competent judges, attorneys-general and law officers. Established legislation does not guarantee the full scope of human rights and fundamental freedoms, and military decrees and emergency laws weaken certain rights already covered by legislative provisions.

1.6 The Constitutional Court

The Constitutional Court of Sudan was established under Article 119 (1) Chapter V of the Constitution.[64] This Court consists of nine Justices of demonstrated competence, integrity, credibility, and impartiality. It is the highest and final court in the hierarchy of judiciary in Sudan. Therefore, any decision rendered by the Constitutional Court on any matter is, by the doctrine of that Constitution, final and binding on all other courts in Sudan.[65]

According to Article 121(1) of the Constitution,[66] the President of Sudan, with the consent of the First Vice President, appoints the President of the Constitutional Court. The Constitutional Court shall be the superintendent of the Sudanese Constitution and the states. Article 122 (1) of the Constitution[67] outlines the functions and purposes for which the Constitutional Court was established The Constitutional Court considers the following:-

(a) its interpretation of constitutional or legal provisions.

(b) Its original jurisdiction to determine disputes that arise under this Constitution and the constitutions of other states at the instruction of the government, juridical entities or individuals.

(d) The protection of fundamental rights and fundamental freedoms.

(e) Decisions on constitutional disputes between individuals and organs of government, in respect of areas of exclusive, concurrent or residual competence.

---

[64] Constitution of Sudan 2005, Art 119(1)

[65] *Civil Aviation Authority of Sudan v. Amer United Co., Ltd* (2008) 9 SCAL 7

[66] Constitution of Sudan 2005, Art 121(1)

[67] Constitution of Sudan 2005, Art 122(1)

During a campaign of Islamisation in Sudan in 1983, the federal government established the civil and Shari'a courts, which had earlier been created during the colonial period. Subsequent constitutional reform did not change the power of formal courts to consider Shari'a law.

1.7 The National Supreme Court

Article 125 (2) Chapter I1[68] of the Sudanese Constitution bestows the judicial powers of the Republic of Sudan on the National Constitutional Courts. When categorising these high courts, jurisdiction has narrowed in relation to the subject matter of the types of of cases they can hear. However, their jurisdiction is not limited by the financial value of the subject matter of a case.[69]

The Supreme Court contains not less than three Justices of the Court, except where it is exercising its original jurisdiction. A majority of judges gives decisions; they are subject to review only if and when the chief justice deems that a violation of Shari'a principles has taken place. In this case, the Chief Justice nominates a five-judge panel, the majority of whom must not have been engaged in giving the disputed decision in order to consider the matter.

The question of the interpretation or application of the constitution, or whether any provision related to the provisions of fundamental rights in the constitution has violated or is likely to be wrong,[70] the judgment of the Supreme Court on any substantive issue is final and may not be subject to an appeal; this is, however, without reference to the power of the President, or Governor of a State is exercising Prerogative of Mercy in appropriate cases. The verdicts of the Court are binding on all other courts in Sudan.

The Supreme Court deals with appeals against the judgments of the courts of appeal in civil, criminal, and personal status matters. The Court has leading jurisdiction judges to review appeals against the administrative decisions of the president of the Republic of the rulers and the Federal and Municipal ministers.

[68] Sudanese Constitution 2005, Art 125(2)

[69] Hosham Ali Sadig, *The Conflict of International Judiciary Jurisdiction,* (Khartoum University Press, 1994) 113

[70] A personal interview with three Judges of Constitutional Court namely: *Mawlan*a Mukhtar Ahmed, *Mawlana* Osama Abdulla And *Mawlana* Abdidin Salah (in Khartoum 4th May 2016).

1.8 The National Court of Appeal

Article 126, Chapter II of the Sudanese Constitution[71] established the Court of Appeal for the twenty eight Municipals capitals cities in Sudan and Khartoum. Each High Court is divided into as many judicial divisions as is considered necessary by the Chief Judge. That is essential for administrative purposes. The Court of Appeal is third in the hierarchy of courts in Sudan, and its decisions are binding on all other lower courts. It is composed of the President of the Court of Appeal, and the other one hundred and thirty judges of it work in the form of circular court, all located in the main cities renders decisions by the majority of judges' courts. In order to practise its jurisdiction, a Court of Appeal panel must be formed by three experienced Justices. The dispute, including an application of sharia or personal status matters, one of the three Justices must be knowledgeable in the relevant area of law.[72]

Article 132 (2) of the Sudanese Constitution provides the appellate jurisdiction of the Court of Appeal authorises it to hear and decide (to the dismissal the judgements of any other court of law in Sudan), appeals from the National Public Courts, Courts of First Instance, the Shari'a and Personal Status Courts, the Rulers, and Customary Courts. It also has jurisdiction to review the provisions of the law, as well as that primary jurisdiction to hear the final administrative appeals issued by the committees and management.

1.9 Other National Courts

Article 128 of the Constitution referred to the formation of other courts that are widespread in all the cities of Sudan. The Constitution did not specify the functions and jurisdiction of these courts, but Article 16 (1) (2) of the Judicial Law 1986, named these courts and defined their functions and jurisdiction. It is a public court and court of the first instance which consider the civil and criminal cases that arise from the commercial activities and direct interaction between citizens, and Rural Courts or Customary Courts.

[71] Sudanese Constitution, Chapter II, Art 126.

[72] Mawlana Mukhtar Ahmed, Mawlana Osama Abdulla And *Mawlana* Abdidin Salah (n21). In Sudan, its usual to find some judges hearing each more than twenty suits per day. Some of them are preliminary whereas the others are hearing advanced proceedings. Delayed procedure in front of Sudanese Courts is abundant and guaranteed by the Civil Procedures Act 1983. Such protracted procedures made some suits take more than seven years in consideration without being settled.

1.9.1 There is a National Public Court in each city of Sudan. Each court is made up of one Chief Justice and is regarded as the primary jurisdiction for considering civil lawsuits and criminal and personal status in addition to considering exceptional decisions issued by the courts in cities and rural areas. They also consider the resolutions related to or combined with any labour, employment, commerce union, industrial associations, and issues arising from the workplace, the requirements of service including health, safety, and the welfare of labour, employees and workers.

1.9.2 The Court of First Instance is a first-class court, which hears disputes for the first time. It has a general jurisdiction to view all matters, except those that associate directly or indirectly to nationality matters and issues of sovereignty. It has branches to consider the issues of principle provisions (*Hudood*), punishments (*Qasas*), civil and commercial matters, personal status matters, heritage, administrative disputes, and other affairs. There are three hundred and ninety-seven Courts of First Instance located in all parts of Sudan. The Courts of First Instance have the competence to consider proceedings filed before any other courts only if they come under their jurisdiction.

1.9.3 The Cities and Rural Courts or Customary courts. Judges are appointed from among the highly qualified citizens of high ethical conduct that they must be prominent persons in the community. In rural areas, the membership and the Presidency of the courts are selected from the tribal chiefs as well as *Sheikhs* and Mayors and principals.[73] The most important characteristic of these courts is that they will not implement custom that is contrary to law or public order. They reconcile and resolve the dispute over borders and grazing areas and water and agriculture and also consider matters relating to nullity, divorce and separation regarding marriages concluded under Islamic principles. Due process in customary courts does not seem to be explicitly defined, providing them variable and inconsistent application of the laws. Disputes in customary courts can be appealed to judicial courts; such courts also have powers of arrest.

Arbitration has been,however practised to settle private and commercial disputes between members of society as well as disputes arising in two groups or communities. Mediation, on the other hand, has been applied to consider domestic disputes in limited groups such as the

[73] El-Fahal El-Tahir Omer, *The Administration of Justice During the Mahdiya, Khartoum*, (Dar AlNasher Publishers 1964) 189

family. It should be mentioned that the Sudanese notion of family is more comprehensive than the western concept. For example, a marriage between a male and female is assumed to be a marriage between their families and in certain situations, their societies.

International treaties or conventions are not implemented in Sudan unless the National Assembly under Article 108 of the Constitution embodies them into law.[74] However, Islamic jurisprudence is operational in Sudan under the provisions of the Judicature and Application of Laws Act 1984. Other foreign laws or courts and their judicial decisions should not conflict with Islamic principles and morals and the public order for recognition and enforcement of these awards.

Sudanese legislation contains rules and regulations ratified by Parliament and those formulated by other statutory and professional bodies[75]. The enforcement of those standards and regulations in breach would be considered depending on the nature of the case or by a court of law or the Public Prosecution Authority and Court Police Department. Besides, the platform through which legal redress may be sought is extensive in the sense that, in addition to the application of procedural laws specific legislation on human rights violations or professional misconduct are also considered where relevant.[76]

1.10 Sources of the Legal System in Sudan

The judiciary in Sudan has an Islamic foundation such that, where relevant, the principles of Islamic philosophy are also applied, namely the principles of justice, fairness, and good conscience. However, as late as 1983 when the judicial law of Sudan was enacted it required that it be applied to citizens at an appropriate level of development and awareness, as foreign investors from the private sector prefer to operate on the basis of clear, black letter law (non-Islamic law). The problem still remains in Sudan in that it is a multi-cultural, multi-racial, multi-ethnic, multi-religious, and multi-lingual country where Sudanese diversities co-exist; but section (5)[77] of the new legislation includes principles of Islamic law. It is worth pointing out that Sudan is an Islamic state and that Shari'a, or Islamic principles are regarded as the

[74] Akold Man Tier, '*Private International Law in Sudan in Cases and Materials'* (Khartoum University Press 1981) 119
[75] ibid 143
[76] Antony N. Allott , *New Essays in African Law*, (1st edn. Cambridge University Press 1970) 12
[77] Sudanese Constitution 2005, Art 5

primary source of country's legislation. Also, section I (17) (A)[78] requires that the State respects international treaties and conventions and works to implement all the agreements and international conventions and treaties to which Sudan is a party, in addition to consolidating universal peace, respect for international law, treaty obligations, and fostering a just world economic order. However, unfortunately, this is not the case as yet.

The first chapter of the fifth Article section (2) of the Constitution states that nationally enacted legislation applicable to Sudan shall have as its sources of legislation, public consensus and the values and the customs of the citizens of Sudan, including their traditions and religious beliefs, having respect to the social variety in Sudan's society.

Even though the Sudanese constitution has formally provided other sources of legislation equivalent to the form of Islamic law, it has left Islamic law unequal to the task of consensus and custom.[79] In any case, the setting of Islamic law as a material resource equal to the power of the constitution means that Sudanese legislators can legislate according to Islamic law even if it is contrary to the constitution, based on the principle of original equivalence of sources of law. In other words, from a practical point of view, judges in Sudan maintain that Islamic law is above the constitution and gives the legislator the freedom to legislate and contravene the constitution and thus violate the principle of constitutionalism. Also, According to Article 3 of the Authentic of Judicial Judgments Law 1983,[80] the Sudanese legal system is the sole source of Islamic law. Thus the ordinary legislator has the ground to settle the contradiction in favour of Islamic law. It is important to note that, by virtue of the above article, the state, in the absence of the provisions authorising the application of the other sources of law, made the Islamic law as a primary source available.

This researcher believes that the Sudanese legal system must take greater steps to incorporate the great diversity in its society. In order achieve this, it should either leave the sources of legislation without enumeration or to enumerate without preferring one of the sources of law to the other. In addition, provided that the Constitution is the primary document which should not follow any source of law as the sole measure. This is to avoid the devastating effect of the aforementioned constitutional precedent. It is preferable to leave the court with freedom the to return to the principles of equity, justice, and conscience as in the past, without restriction

[78] Sudanese Constitution 2005, Art 1 (17) (A)

[79] Khalil M. Ibrahim, '*Problems of Law Reform in the Sudan'* (1st edn. Khartoum, AL Daar AL Sudaniya, 2013) 100

[80] Authentic of Judicial Judgments Law 1983, Art 3

or differentiation or the resolution of the contradiction for the benefit of a particular source of legislation.

However, nowadays, Islamic Laws have inherited a mixed legacy of two contradictory approaches to legal development; the one creative and original, the other formalistic, technical, and sterile. However, the adoption of the latter will lead to results similar to that which happened in the Sudanese legal system during the past two decades. [81] Taking the former approach would make it possible to reform the Sudanese legal system in such a way as to meet the conditions of liberal democracy and the rule of law and honour the obligations which would form part of new world order.

The task calls for a high powered commission, committee or agency, composed of academically qualified, competent, and experienced lawyers. Ideally, the Government would take the lead in a project of comprehensive law reform, but the Government's policy crafters and decision makers may not see eye to eye with experts such as lawyers, on the priorities of sources of legislation, law reform or how to set about it. The Sudanese jurists should make a beginning and try to co-operate as much as possible with new official authorities avoiding conflicts and adopting the line of least resistance.

1.11 The needs of the Sudanese Judiciary System

It was evident from previous discussions that the judicial system in Sudan is in a state of challenge. Mawlana Ali M Hassanain indeed submitted that:

> "The *Sudanese judiciary that purposely discharged its functions during the early pre-independence of 30 years, now witness signs of weakness, insufficiency and baseness."* [82]

As it is, the Sudanese judiciary is struggling under the influence of the country's national disputes as well as covered with many controversial issues above mentioned. Unless serious planning and hard work is done and very quickly; there may arise a more critical situation, and possibly a complete failure of the judiciary in the next coming years might take place. It is proposed that the developing of the economy will attract investors, particularly for areas that have not experienced significant growth in Sudan. Naturally, one cannot rule out the truth that a range disputes will emerge from this new wave of commercial activities.

[81] Zaki Mustafa, '*Opting Out of the Common Law: Recent Developments in the Legal System of the Sudan'*, (3rd edn, Kharoum University Press 2009) 110
[82] Ali M Hassanain (n4) 60

The question that arises in this case is simple: can a state which lacks the physical and intellectual capability to provide for its domestic disputes adequately manage the complex disputes that will arise from expected foreign investments?

The need for judicial reforms, particularly at this time, cannot, therefore, be exaggerated. In order to avoid a potential collapse of the Sudanese judiciary, the government should rebuild the confidence of the Sudanese people in the judiciary. The state should also establish Sudan's budding democracy and very importantly, project an advanced dispute settlement system to encourage investors. There is a critical need for what *Mawlana* Saif A Hamdnalla points to as:

> "*strong and determined experimentation coupled with a readiness to adapt with regard to judicial reforms*."[83]

A useful starting point will be to promote and encourage an open, reliable, and fair recruitment process as well as a merit-based system in the recruitment of judicial officers. The steps to upgrade the judiciary must include limiting the employment of people with a professional attitude and competence as judges. Also, as Professor Mohammed Ibrahim Khalil rightly noted out, there is a *"…need to change the provisions from which judicial appointments are created because of the decreased intellectual intensity and overall quality of the judgments of some judges in Sudan, which are destructive."*[84]

The current Judicial Law needs to be amended to encourage an appointment process that is open to all qualified members of the Sudanese judiciary. In this process, the judicial authority should seek to recruit new judges for a specific court, must advertise on the Ministry of Justice's website, the notice board of the court concerned as well as through the applicable section of the Sudanese Bar Association.[85] The Ministry of Justice also should order to write to the Chief of every other High Court in Sudan as well as assisting Judges within the Country, requesting the appointment of suitable applicants. That will improve on the current practice, which, as has already been discussed, as is usually covered in secrecy and favouritism.

---

[83] The former judge Saif A Hamdana ''Describes the Sudanese judiciary and prosecution as a tool of the National Congress Party''. Available at: https://www.altaghyeer.info/ar/2019/03/05/%d9%85%d8%b5%d9%8a%d8%b1-%d9%82%d9%8f%d8%b6%d8%a7%d8%a9-%d8%a7%d9%84%d8%b7%d9%88%d8%a7%d8%b1%d8%a6/ Accssed Accessed 5 June 2009.

[84] Khalil M. Ibrahim, '*Problems of Law Reform in the Sudan* (1st edn. Khartoum' AL Daar AL Sudaniya 2013) 112

[85] The National Judicial Law 1983 did not provide guidelines and procedural rules for the appointment of Judicial Officers of all levels of courts in Sudan.

The Minister of Justice or the Chief Justice or Judge in his/her function as Head of Judicial Authority is required to shortlist from the number of applications received and refer the same to the assigned judges of the high court for approval. It is recommended that the process of shortlisting be made more transparent to all parties or at the most limited and should involve more than one person in order to stop the abuse of authority. The judicial law should be amended to include provisions for an interview session for judicial staff, which is to be carried out by the academics and judges of the high court. This way, the commission can assess the applicant's understanding of the law as well as to conduct an examination to determine their eligibility for the position of a Judge. Any applicants determined to be controversial are to be excluded from re-applying within at least three years.

The provisions should also allow members of academia to be selected as Judges of the Constitutional and High Courts. This provision, as mentioned above, should also be actively reviewed to enhance the intellectual capability of applicants to improve the quality of judgments of the Sudanese courts[86].

There is a need to enhance the judiciary with legal experts who have experienced suitable training and experience to acquire an appropriate level of analytical conception. In Egypt, for example, newly recruited judges are required to attend a training course extending between six months and 12 months at the National Judicial Institution.[87] This training focuses on teaching judicial staff with the best knowledge, character, abilities, and integrity. That is as against the two to four week training course in Sudan. Newly recruited judicial judges should be prepared to undergo a complete training process, to equip them with the best skills and behaviour needed to produce a reasonably good judge. Significant in this context is the initiative to include more academics within the supervision of the national judicial authority as opposed to the current practice where it is operated by an elder and traditional judges whom themselves need further training. Professor Kamil Idris indeed pointed out that,

> *"since litigation frequently becomes complicated, and lawyers achieve higher learning and technique as a consequence of technological progress in the community, judges must be trained to collaborate with or coordinate the expertise of highly qualified lawyers."*[88]

[86] Akold Man Tier (n74) 213

[87] Official website of the Egypt Judicial Institution <http://https://egyptjustice.com/judicial-independence Accessed 5 July 2017

[88] Edris Kamil , '*Practical and legal Structure and Vision on Arbitration Act 2005'* (Khartoum, AL Daar AL Sudaniya, 2006) 89

An introduction of competent law researchers and law academics in the supervision of the national judicial authority will support them to meet their lawful necessity of advanced training. There is an apparent need to encourage a consistent and periodic training process for both senior and junior judicial staff. A strong start may be to create a judicial training module at the Sudanese Law School, which may well be voluntary. Professor Mohammed, Khalil opined that "by establishing a policy of training that starts in law academy, we can adequately outfit judges".[89] *Mawlana* Hamadnalla has gone as far as supporting the need for a unique LLM program for possible and prospective judicial staff. A federal training method for potential judicial officers is also an additional suggestion.[90] The Sudanese government also should provide a suitable environment for administrative staff and judges. Judges are not prophets. They are humans, and they have their limitations. There is a necessity to enhance the conditions of interests for members of the judiciary because as Dr Mohammed Osman rightly noted, "fair requirements of service will also bring the right quality of individuals to the bench and reduce the tendency of corrupt practices, and a person who is not financially secure is more susceptible to corruption."[90]

Furthermore, successful members of the bar with the right experience, knowledge, and interest in subscribing to the bench will not be hesitant to leave their successful practices if a high welfare requirement is added to the condition of a Judge. Providing the judiciary free control over its finances will be a move in the right direction. Moreover, excellent and consistent welfare terms will surely go a long way to reduce corruption inside the judiciary.

There is a critical need to formulate further courts, select more judges, and perform a more reliable and dependable base[91]. A circumstance where ten judges determine sixteen thousand cases without a registration system or sometimes electricity is unfair. There is also a need to have a decent and computerised recording of cases, particularly at the country level. This is the only approach to assess the work correctly and by extension, produce and encourage better performance. Finally, and critically to this research, it is a necessity to promote and encourage the practice of suitable alternatives to litigation (for example arbitration), in a recommendation to examine several of the problems of the judicial system in Sudan. For

[89] Khalil M. Ibrahim (n68) 77
[90] Saif A Hamadnalla (n67)
[90] M.Osman, 'Legal Framework for the Determination of Commercial Disputes': (2015) 4(6) Sudanese Journal of Public Law and Politics Research 47, 48
[91] Ali M Hassanain (n82) 110

example, it is submitted that presenting a proper alternative will decrease the current pressure on the Sudanese courts.

The shortcomings of litigation in Sudan are shown by the performance of her courts, which always causes obstacles in the administration of justice to her citizens. These deficiencies can mostly be connected to the recall of a separate dispute settlement process (litigation). To overcome these deficiencies is the provision of a multi-process dispute resolution system, which includes litigation and other alternative dispute settlement proceedings.

This is based on the assumption that litigation is not the only method for settling disputes. [92] Dr Mustafa Idris noted that "competitions identified the ensuing complexity of social-economic relations and conflict creating new needs, challenges and need to overcome the traditional judicial systems which are extensively observed as out-dated and inadequate of fast and effective control and resolution of disputes.''[93] That has happened in a crisis in litigation; therefore, the necessary call is for imperative research and reform to rebuild a fair, effective, and efficient judiciary supported by an alternative dispute resolution.

1.12 Conclusion

This chapter has presented a historical overview of the growth and development of the system of judicial settlement in Sudan. Sudan has passed through different stages of historical growth since it was initially under the Islamic Kingdom of Fung rule and then after the British colonisation of the entire country. The Sudanese legal and judicial system may be divided into three different stages; (a) in the era of Islamic Kingdom of Fung otherwise known as Sinnar (1504 – 1821); (b), during the era of the ruling of the Turko – Egyptian and Anglo-Egyptian in Sudan (1899–1956); (c) and judicial system in modern Sudan. The researcher has studied the most significant changes in each stage.

Throughout that period, the Sudanese economy was based on grazing, agriculture, and trade. Following self-determination, a new period started, in which the governor's office tried to found authority on both the state and local levels. Being a sovereign state, Sudan began to be engaged in foreign relations and the established state institutions. Subsequently began the current scene, as a result of her economic growth.

[92] Zaki Mustafa (n65) 112

[93] M.Idris 'Judiciary Academy: A program for a Pre-Judicial LLM Stage' (2014) 64 Journal of Sudanese Justice 12, 16.

As an Arab and Muslim society, the Sudanese tribes settled disagreements by methods based on arguments of Justice according to Sharia law. Accordingly, the Shari'a judiciary was adopted[94]. Also, the customary judges participated because the Sudanese community was based mostly on the grazing, agriculture, and trade, as mentioned earlier. The customary judiciary was restricted to judging disputes of pastoralists and farmers based on customs and cultures. These decisions were of one level and not disputable.

During Turko-Egyptian and Anglo-Egyptian rule in Sudan, the laws applied in Sudan were a mixture of Islamic Sharia doctrines, derived from laws applied in Egypt and the Ottoman Empire, and local customs. This period is considered as the beginning of the framework of the Sudanese judicial system, or a period of transformation from an Islamic judicial system to a modernisation of the legal system, which was one of the most important goals of Turkish-Egyptian colonial rule in Sudan. The judiciary was a main enforcement arm of the government, but was provided with very restricted facilities and limited financial support. At the same time it was expected to perform its duty to keep society safe and free from crime. Moreover, it has been misused for the benefit of politicians and influential people in the state.

During the rule of the National Islamic Party, the judicial system almost became one of the security organs operating under the leadership of the ruling party and security forces' cadres.

Most of the Judges in Sudan continue to manage the court proceedings in longhand. Judges are engaged with a number of difficulties arising from hearing cases involving areas of law that were not offered at the time of their legal training, to the extent that they received any. They do this under poor and miserable conditions. Sudan continues its challenges with the electricity supply problem, while judges and lawyers alike are expected to spend long hours in courtrooms during court proceedings in the hot Sudanese weather.

The independence of the judiciary is a vital element of achieving the rule of law and building an improved social and economic policy. When it comes to forming the rule of law in a war-stricken country, several steps must be taken to achieve this goal. In this regard, social peace is the key.

It was argued that Sudan had weak institutions and systems to build and maintain the rule of law, protect fundamental rights, and stop the recurrence of violence. The judiciary has created a bad reputation for its inability to investigate and execute human rights crimes. The current

[94] El-Fahal El-Tahir Omer (n73) 303

operational shortcomings can be traced back to decades of conflict, the country's geographic, ethical, and religious' background, and a culture resistant to developing judicial independence. Moreover, it can be concluded that the deficiency of the Sudanese judiciary is the outcome of the absence of the notion of judicial independence among the substantial majority in the state, along with the political and religious pressure on judges.

Arbitration in Sudan is the main research subject. Since arbitration is an alternative to litigation, a brief review of the justice system in Sudan and the judiciary's development through history to the current is required. This will make it possible for the reader to become acquainted with the legal system in Sudan. Research on the Sudanese judicial system has also shown that its development has been related to the state executive body's growth. Both have gone through various historical stages of growth, although Sudan's only became independent on 1 January 1956.

In the past, local, national and joint international committees have formed the Sudanese judiciary, consisting of foreigners and Sudanese. The justice system in Sudan has now been crystallised in a different shape. As a result of this long evolution of the judiciary in Sudan, this section analyses the judiciary from the start to the most recent reforms.

Chapter two. The Historical Growth and Development of Arbitration in Sudan

2.1 Introduction

Arbitration is a system of settling disputes, originated by merchants which has been in existence for thousands of years.[1] The origins of arbitration go back to dispute settlement usages in ancient times, with examples in Asia, Europe, Greece and Italy.[2] The history of arbitration, unlike the history of law, is not an account of the growth and development of principles and doctrines that have come through extended use in order to have general validity and force.[3] On the contrary, it is a natural predecessor and companion to the justice system.[4]

Arbitration is a method of settling disputes that arise between parties, especially in commercial matters. Historically, it is the most popular known means that was used to settle disputes between persons or between States. Foreign investors prefer a stable commercial environment in which to invest together with a reliable legal system, and hence arbitration is part of this regime.

In the past, tribes and groups used to champion themselves in grievances, usually by force, until alternative and amicable methods for peaceful dispute resolution evolved through mediation, conciliation, and arbitration. In Sudan, the foundations of arbitration have been established; its rulings progressed as well as being adopted as a quasi-judicial system for dispute resolution, especially in respect of those cases which related to local and international trade.[5]

---

[1] Derek Roebuck, '*Sources for the History of Arbitration*: *A Bibliographical Introduction'*, (2nd edn, Oxford University Press 1998) 114

[2] Derek Roebuck, 'Cleopatra compromised: Arbitration in Egypt in the First Century' The Journal of the Chartered Institute of Arbitrators, (2008) 263

[3] Earl S. Wolver, 'The Historical Background of Commercial Arbitration' (1934), Available at: https://scholarship.law.upenn.edu/penn_law_review/vol83/iss2/2 132. Accessed Decmeber 2017

[4] Derek Roebuck. (n1) 266

[5] It is not necessary to refer dispute to natural persons only, they can be submitted to corporate bodies since there are many specialised committees, centres and technical bodies in the field of national and international arbitration especially in the aspect of commerce to mention some. For eaxmple see: The Conciliation and Arbitration Committee of the Sudanese Businessman & Employers Federation (SBEF). Moreover, the Khartoum Centre for Arbitration, the National Centre for Arbitration, The Arab Centre for Arbitration, the (CRCICA), Centre of the Dubai Chamber of Commercial and industry, the Commercial Arbitration Centre of the Arab Gulf

This chapter seeks to examine the historical growth, development and the nature of arbitration in Sudan by identifying and analysing the attitudes towards arbitration in Sudanese society. Also, it stresses the influence of sharia principles in Sudanese law; in particular, the issue of arbitration as a concept and the recognition and enforcement of arbitral awards. The main areas of concern are the forms of arbitration and international arbitration under Sudanese law and the advantages and shortcomings of arbitration as a method of settling disputes in Sudan. These issues and the nature of arbitration will also be studied.

This chapter also critically analyses the provisions and articles of the relevant laws that are applicable to this study and analyses other relevant materials that explain and interpret those provisions and documents.

2.2 A Brief Account of Attitudes towards Arbitration in Sudanese Society.

Before colonisation, the geographical area now known as Sudan was composed of independent groups of people, each with its own culture[6]. This culture included the various systems and practices in which people managed the various aspects of their lives, the most important of which was a powerful dispute settlement system, which people used to manage economic and social disagreements.

Each kingdom in Sudan had its own social structure and system of government and trade.[7] There were commercial and political relations between these nations, as well as tribal conflicts which still exist, but in relation to business transactions, border demarcation, pastures, and farms, disputes inevitably arose[8]. The tribal chiefs (who functioned as the native administration) played a significant role in society since they were regarded as the ruler and the judge within the framework of their tribes.

States Corporation Council, the Arab Europe Chamber of Commerce for Arbitration and Conciliation, the ICC and the (ICSID) the American Society for Arbitration.

[6] Izaldin Abdulla*, International Private Law*, (2nd edn, University of Al-Nileen Library, Khartoum, 2014) 914; See also Ibrahim Draig, *Internal & International Arbitration*, (2nd edn, Daar AL- Nashir, Khartoum. 2014) 27

[7] ibid

[8] Youssef H. Fadul , paper presented under topic: 'Sudanese Identity, Features and Roots: Remarks on its Development and Vision of its Future.' Seminar held in Khartoum, in Al-Ez Ibn Abdul Salam Centre for Arab, Islamic and African Studies, (May 2014)

Due to the lack of a modern system of government and legislative authority, the early Sudanese tribal societies tended to resolve their problems through "*Agaweed*", which in Arabic means mediators/arbitrators, who undertook conflict resolutions through the rules and traditions of the parties to the conflict.

Those mediators /arbitrators were acclaimed for their wisdom. Arbitration has prevailed in the past and which is still functioning now both in the rural societies and also at the municipal levels[9]. Moreover, in Sudan's traditional legal culture, there was no concept that ″rational and the just*″* procedure would be necessary for the resolution of disputes.[10] The early Sudanese people believed that referring disputes to a court would interrupt the stability of both society and customs. Thus public opinion favoured resolving their disagreements by conciliation and arbitration rather than taking disputes to court.[11] The rules were based on the traditions of the tribe, and people believed in ethics as the most effective means of regulating standards of behaviour. By contrast, they deemed law, which is enforced through the exercise of power, as false, independent, and lacking effectiveness.[12]

They also believed that although the law can force a person to do or refrain from doing something, it cannot make a person act on his initiative, and the law was thus much less effective than the ethical traditions of the tribes. However, traditional Sudanese culture had an in depth philosophy; some of its contents were positive, but some were not beneficial for the development of Sudanese law[13]. Accordingly, legislators have not given much attention to questions of arbitral procedure, and so; as a result, the procedural rules of Sudanese arbitration law have many defects.

After the independence of Sudan and the establishment of the organisation of legislation, between 1974, (which is when the existing Sudanese Civil Procedure Code which includes provision for Arbitration and Conciliation was established), and the present day, several useful changes have taken place within the regulation of arbitration.

---

[9] Abdullah A Ibrahim, *Manichean Delirium: Decolonizing the Judiciary and Islamic renewal in Sudan, 1898-1985,* (Leiden University Press 2008) 520

[10] Ibid

[11] Zaki Mustafa, *Opting Out of the Common Law: Recent Developments in the Legal System of the Sudan*, (1st edn, Khartoum University Press. 1973), 100- 122

[12] Makki Shebaika, *The Sudan over the Centuries, Al-Sudan Abr A1-Quroon,* (2nd. Edn. Daar El-Nasher, Beruit 1965) 113

[13] AL Khair Gash, *Difference Between Arbitration Methods for Settlement of International Disputes*, (1st edn, University Institute for Studies, Publication and Distribution, Khartoum. 1999) 112

There had been a growing movement towards the enactment of arbitration laws and an attempt to create an advanced arbitration system, as is evident in the Sudanese Civil Procedures Code 1983, the Arbitration Act 2005, and the Arbitration Act 2016, which also deals with the issue of enforcement of both domestic and foreign awards.

Sudan has also ratified several international and regional conventions on arbitration, such as the ISCID Convention and the New York Convention on the enforcement of foreign arbitral awards. However, difficulties with the latter convention exist, and these are analysed in chapters 5 and 6.

The Sudanese arbitration system contains several anti-arbitration provisions which can present obstacles to the growth of commercial arbitration and should be removed[14]. The analysis would demonstrate that the new arbitration law does not take into account the needs of international investment. Moreover, the law failed to develop the practice of international commercial arbitration that already exists and is recognised by the Investment Act 2013 and the Company Act 2015.[15]

Also, article 44 (3)(4)(5)6) of the current Sudanese Act 2016 grants courts unlimited power to to set aside the arbitral award and invalidate arbitration agreements without the consent of the parties. Also, article 42 (3) of the same Act provides the courts with the power to determine whether or not a stay order should be granted. These two provisions are contrary to the effective implementation of arbitration. However, the current Act had been characterised by shortcomings that emerged as it was being implemented. This will be dealt with in the next Chapter.

In 1981, the authority issued the Attorney General Regulations for Arbitration between Government Organs';[16] composed of eleven articles, which set out the constitutional technique of referring disputes to arbitration, the constitution of the arbitration tribunal, the arbitration procedure, as well as the authority of the Attorney General to uphold or reject a tribunal award. The problem with the Attorney General Regulations is due to the disparity of the government organs and the authority vested in the Attorney General in conflict resolution

[14] Kamil Idris. '*Practical and legal structure and monetary vision in arbitration Act 2005'.* (1st edn, Khartoum, Al-*Daar AL-Sudaniya.* 2006) 29

[15] Article 39 (1) of Invesment Act 2013 provides *that; 'If any legal dispute ensues in respect of the investment, it shall be initially presented to the competent court unless the parties agree to refer it to arbitration or reconciliation'.*

[16] Article 3 of Attorney General Regulations 1981 for Arbitration between Government organs.

between these bodies and the fact that the Attorney General is the legal advisor to the government.[17]

The legislation of some countries curtailed references to ensuing disputes between government organs for arbitration.[18] However, the approach adopted by the Attorney General in Sudan and some of the related legislation should not be considered as lessening the prestige of the national judiciary.[19] On the contrary, because the Attorney General is endowed with the power for the resolution of these disputes, and because it is quicker and more convenient the Attorney General often tends to allow the other party to resort to the judiciary.

In most cases, the constitution of an arbitration tribunal involves the Attorney General undertaking to appoint one of the Legal Counsels in the Ministry as the President of the arbitration tribunal.[20] The parties will leave the opportunity to nominate arbitrators from their side to the arbitration tribunal.

In 1996 the Sudanese Businessmen's Federation issued the Conciliation and Arbitration Regulation according to Article 6 of the Association's Statute, which included six chapters dealing with introductory provisions, conciliation and arbitration tribunals, arbitration procedures as well as costs of arbitration. Those who drafted this regulation included veterans in arbitration transactions on the national and international level, and it would have been constructive had their experience been taken into account to a greater extent.

In 2001, the Engineering Council issued the Arbitration Regulations for Engineering Disputes in 47 Comprehensive Articles, including all aspects of arbitration procedures. However, those regulations did not include a speciality for arbitrating engineering disputes, such as exists in the UK or the FIDIC.[21] In that respect, the Sudanese Businessmen's Federation were not successful in establishing an organised arbitral tribunal centre.

[17] Chancellor Fathi Naguib, In an editorial, which includes the explanatory memorandum and preparation for the new Arbitration Act 2005. Published by the Department of Legislation – the Ministry of Justice (2007) 11

[18] Abdel Hamid AL Hadab, *Arbitration with the Arab Country*, (2 edn, Edn Kluwer Law International, 1999) 167

[19] Ibid

[20] Article 11 of Attorney General Regulations 1981 for arbitration between Governments organs

[21] FIDIC, the Federation International des Ingenieurs-Conseils and GAFTA, the Grain and Feed Trade Association Arbitration Rules are among the examples that can be given in this regard. It is well known for its work drafting standard form Conditions of Contract for the worldwide construction industry, particularly in the context of higher value international construction projects, and is endorsed by many multilateral development banks ("MDBs").

However, before the Sudanese Arbitration Act 2005, there was no concept of separate arbitration law. Sudan did not follow the UNCITRAL Model Law and the only source of arbitration law was the provisions available in the Sudanese Civil Procedure Code of 1983, in Chapter VI under the title: (arbitration and conciliation). However, those rules were too rigid to follow in an arbitration process. As a regular practice, the Sudanese judicial system (Court of First Instance, the Court of Appeal, the High Court, and Constitutional Court) used to invalidate awards by gaps in procedure or breach of mandatory provisions of Sudanese Law. Arbitration provisions in the Civil Procedure Code of 1983 benefited from easiness and clarity, but were the product of an obsolete era of arbitration. It provided an increased opportunity for the parties to delay the action of the courts in the arbitral proceedings, which ran counter to the speed and lack of intervention preferred by commercial users of the arbitration.

Moreover, although arbitration is believed to be an independent forum for dispute resolution, the court plays an essential role in ensuring that the arbitral proceeding is taking place in a reasonable and independent way. The current deficiencies in the Sudanese Arbitration law are that the Sudanese Courts' performance towards international commercial arbitration has been problematic, and the courts historically intervene in the arbitral procedures, even over small matters[22]. In Sudan, in contrast to most of the countries in the world, the parties were required to seek permission from the court before starting arbitral proceedings.[23] Approval of the award through the Sudanese Court is obligatory for their enforcement.

Enforcement of foreign arbitral awards in Sudan is another significant issue, which is examined in chapter five . In fact, until recently, it was a fundamental part of arbitration that the awards rendered in Sudan were not enforceable except in a country with which Sudan had signed multilateral or bilateral Conventions or Treaties.[24] In this context, it is worth mentioning that Sudan signed 'The Riyadh Convention on Judicial Cooperation between States' of the Arab League 1983, which was enforced in 1999.

[22] Kamil Idris (n14) 134

[23] The Civil Procedure Code 1983 has provided excessive scope for party cause delay through the court intervention in the arbitral process.

[24] Abdel Hamid AL Ahdab (n15) 193

Sudan is also a signatory to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICISD) 1965.[25] Until 2005 in Sudan there were no clear rules to regulate the recognition and enforcement of foreign arbitral awards. Within the current legal environment, it is difficult for an award which is rendered in places other than the Arab countries to be enforced therein. Consequently, it is hard for awards which were rendered in Sudan to be enforced outside the territory of the Arab countries.

Therefore, Sudan still has a long way to go to improve her standing in the world of arbitration, especially regarding recognition and the enforcement of foreign arbitral awards.[26] The causes of the problems mentioned above are several. First, the lack of legislation and code platforms to support arbitration and the enforcement of foreign awards,[27] and second, there is no express provision under Sudanese law to regulate the recognition of foreign arbitral awards or to grant the Sudanese courts the discretion to enforce it in the same manner of the foreign judgments to be enforced. [28]

Some further methods for recognition and enforcement of a foreign arbitral award are available; it can be enforced by action at common law, as a national award or as a judgment. In March 2018 Sudan ratified the most relevant international convention, namely the New York Convention for Recognition and Enforcement of a Foreign Arbitral Awards, 1958, which is concerned explicitly with commercial arbitration. Also, the judicial system suffers from inexperience and a lack of understanding of international commercial arbitration.[29] Arbitrators' general lack of knowledge of local laws and culture can be a problem when delivering a transnational award when it is likely to be enforced in foreign countries. However, because of the influence of the traditional approach to arbitration in Sudan, some of the legislators retain the idea that arbitration is an administrative activity which needs to be controlled.[29] Therefore, some provisions of arbitration law do not care for party autonomy

[25] The Government of the Republic of Sudan signed the ICSID Convention on April 9, 1973 and deposited its instrument of ratification on May 9, 1973. The Convention came into force for Sudan on May 9, 1973.

[26] Antonius Dimitrakopoulos (n18) Vol 16, No 6

[27] Omar A. Abdurrahman, '*History and Development of the Law of Contract In Sudan' (1898-2000)*, (Khartoum University Press. 2014) 87

[28] Ibid

[29] Essam Al Tammie 'Enforcement of Foreign Arbitration Awards in the Middle East.' (Al Tammie &Co. September 2014) http://www.tamimi.com/en/magazine/law-update/section-8/september-4/enforcement-of-foreign-arbitration-awards-in-the-middle-east.html , accessed 27 July 2017

[29] Izaldin Abdulla*,' International Private Law*' (2nd edn, Khartoum, University of Al-Nileen Press. 2004) 301

adequately, while the courts continue to enjoy too much power.[30] Even the Arbitration Act 2016 shares these deficiencies, and in this respect, Sudanese law did not advance in the period between 1900 -2016. This is the main reason why Sudanese arbitration law is underdeveloped in comparison with the arbitration regulations of some Arabic and African countries.[31] It is a tragedy in Sudan, damaging her economy as a result.[32]

2.3 Advantages and Disadvantage of Arbitration as a Method of Settling Disputes in Sudan

Parties to an international agreement must consider how to settle future potential disputes by choosing one method of resolving it[33]. Although some refer to litigation, most contracting parties prefer to use arbitration to settle their disputes[34]. The following question arises: why do different parties refrain from resorting to an organised judiciary and prefer arbitration? The reasons for the parties' resorting to arbitration instead of the established judiciary is that arbitration is endowed with a number of advantages in relation to international trade.[35]

The measure of acceptance confirms that arbitration is a more suitable means of resolving commercial disputes; both domestic and transnational. Besides, it is the speed and flexibility of the process, making it easier to resolve disputes more quickly by arbitration rather than litigation, and arbitration enjoys more flexibility than litigation.

Arbitration rules and procedures are comparatively simple;[36] rigid rules of evidence are not related, and there is no formal discovery. There are no necessities for transcripts of the proceedings or writing capacity of the arbitrators.[37] Also, the nature of the dispute may be one that requires particular specialist expertise, rather than a lawyer to adjudicate. Plus, the

[30] Ibid

[31] AL Khair Gashi – '*Difference between Arbitration Methods for Settlement of International Disputes'* (1st edn, Khartoum University Institute for Studies, Publication and Distribution. 1999) 179

[32] ibid

[33] K.S. Carlton, *Theory of the Arbitration Process*, (Harvard Law Review Association, 1972) 443

[34] Fouchard, Gaillard, Goldman, and Savage, *International Commercial Arbitration,* (Kluwer Law International, 1999) 223

[35] There are many examples in which the right resolutions can point to an international arbitral process which is optimal in matching the needs of the parties, offering as it does a system of dispute settlement adjusted to the parties' needs and recognising the need for a business like solution to support commerce to continue.

[28] Susan Blake, Julie Browne and Stuart Sime. '*Practical Approach to Alternative Dispute Resolution'* (3rd edn, Oxford University Press 2014) 69-70

[36] Susan Blake, Julie Browne and Stuart Sime. '*Practical Approach to Alternative Dispute Resolution'* (3rd edn, Oxford University Press. 2014) 69-70

[37] Ibid

slowness of court procedures is not compatible with the requirements of transnational trade, which needs the expedited execution of obligations and commitments.[38]

Sudan is a signatory to the New York Convention (which will be dealt with in chapter six), which accepts arbitration as a means of international commercial dispute resolution, and its contracting states are required to enforce foreign arbitral awards. Sudan's economy potentially benefits significantly from the country's openness in maintaining support for the arbitration process as an alternative to dispute resolution, and private foreign investors could potentially invest heavily in Sudan. That will expand Sudan's investment relations, which currently include around 158 contracting states.

An arbitration tribunal's procedures and sittings are conducted in complete privacy, whether taking evidence, preparing for submissions or rendering the award.[39] These are a different form of practice from that of the judiciary whose case files circulate between the judges concerned and the court officials. There is also the possibility of them being read by those officials and parties to the dispute which hampers the secrecy required.[40] This is a fundamental problem since the confidentiality requirement guarantees the commercial and industrial anonymity of both parties to the dispute.[41]

Therefore, confidentiality can be significant, for example, to avoid damaging the commercial reputation of the parties. The reason that parties to a dispute submit their dispute to a specialised court is attributed to their confidence in the law and provisions.[42] As well as their trust in the person appointed for arbitration between them due to his competence and expertise, which make them accept the award issued by arbitrator(s).

Contrary to courts where the senior judge of the circuit selects judges in Sudan without consulting the parties to the dispute, arbitration enables the parties to choose their arbitrators. In arbitration, the facilitated possibility of mediation and conciliation between the two sides exists due to the friendly character of arbitration and the flexibility of the arbitration in

[38] Ibid
[39] Ibid 87
[40] A.Rudwan, '*General Bases of International Commercial Arbitration*' (Dar AL Fikr A.L Arabi, 1981) 30
[41] Abdel Hamid AL Minshawi, '*Arbitration in Internal and International Special Relations*' (3rd edn, Cairo Daar AL fiker AL arbi. 2010) 134
[42] Fouchard, Gaillard, Goldman, and Savage, '*International Commercial Arbitration*', (Kluwer Law International, 1999) 212

reaching an award,[43] as well as the fact that popular traditions and customs are recognised. In contrast, in court, the judge applies the law as it stated.

Consequently, arbitration tribunals could be held in an office, a house or outdoors, whereas in the court formality will intersect control between the parties to the dispute; i.e.,[44] law enforcement officers are standing on guard, with barriers separating the judge from the disputants and another one separating the two parties from each other. The arbitrators can be selected according to criteria that can be personalised to the particular dispute to ensure that they have the required knowledge to understand and evaluate the matter.[45]

Commercial transactions, especially the transnational ones, are complex, and very often the focus of the dispute is not a legal issue but a point relating to, for example, the fitness of goods for use, whether chemicals match their contract description or whether the metal has been manufactured to specification, to name but a few.[46] These issues require expertise and specialisation by the arbitrators rather than legal expertise.[47] Also, arbitration awards could be reached in a few sittings, compared to that of a court and are not subject to appeal.[48]

Another element of the arbitration tribunal is cost. Arbitration is typically cheaper than traditional litigation because of its shorter duration. Arbitration is considered as a safeguard for foreign companies against unexpected legislative amendments, which have the potential to disrupt the economic balance of the contract.[49] The arbitration clause in the contract can determine the basis on which the arbitrator adjudicates and thus the arbitrator is potentially assigned by the parties to resolve the dispute, according to principles of justice and equity, not because the arbitrator is bound to implement the laws of a particular country.

Investment has been recently included in the context of international trade due to its importance and the enormous sums of money spent on its projects that need guarantees of

[43] Ibid 212 – 214
[44] Susan Blake. (n31) 76
[45] Redfern and Hunter, 'International Arbitration, International Arbitral Awards and Settlement Agreements', JCI Arb (1988). 54127- 6
[46] Henry Brown, and A. *Marriot- 'In ADR; Principles and Practice'* (3rd edn, Sweet and Maxwell Ltd, 2012) 119
[47] Ibid
[48] It happened many times in various parts of the Sudan that parties to the conflict engage in fighting after the issuance of a court's ruling of conviction regarding the defendant, or his acquittal. One recent example is that which took place in front of Port Sudan's Court in March 2003 when members of *AL Nourab* tribe attacked the leader '*Nazir of AL Beni Aamir* tribe and killed him on the pretext of his connivance with the escaped defendant.
[49] Derek Roebuck (n1) 8

continuity of execution and maintenance of revenue.[50] Because of the apprehension of investors, especially those from outside Sudan, decisions issued by the government have involved confiscation, nationalisation and the termination of contracts under the pretext of sovereignty, extraordinary circumstances and others consolidated by federal laws.[51] Transitional arbitration can resolve the matter without fears of such governmental activity by the parties concerned.

Despite the characteristics mentioned above, there is some criticism directed at arbitration tribunals, namely that a tribunal may not be sufficiently informed of the technicality of the issue.[52] This may ultimately lead to the problem of defective awards that may harm either or both sides to the dispute. Also, the lack of reasoning in some arbitration rulings could lead to the issue of unclear awards which could consequently disrupt confidence in arbitrators and turn lead to difficulties in execution.[53]

The parties could not execute the awards of arbitration tribunals except after acquiring an executive order from the national judiciary in the country of execution.[54] That selection entails conditions, which allow that authority to review arbitration awards, and it could order non-execution of the award.

2.4 Arbitration under Islamic Jurisprudence

Arbitration, (called *Tahkim* in Arabic), is a standard and oft-used method of dispute resolution in Muslim countries.[55] Parties to an agreement that embody Islamic principles would never need to worry about the agreement to arbitrate a dispute being in contravention of Islamic law. This is because arbitration as a method of dispute resolution has a longstanding foundation and history in Islam.[56]

Before the advent of Islam, the Arabs lacked a structured judicial system; they also did not have a stable source of legislation. Therefore, people had no option other than to resolve their differences and disputes by an informal agreement. However, when Mohamed (Peace be upon Him) arose, the Arabs were surprised by the style and expressiveness of the rhetoric of

[50] M.Tijani, '*International Trade in Arab Country'* (1st edn, Journal of International Arab Arbitration, 2014) Volume 6, 22
[51] Mustafa M. AL lammal and. A Kasha M. Abdullah (n41) 113
[52] ibid
[53] The International Journal of Arbitration, 'Mediation and Dispute Management', Editorial Board, Published in Association with Sweet and Maxwell Ltd. Volume 74, No. 1 (February 2008) 47
[54] Henry Brown and Arthur Marriot (n18) 119
[55] Samir Saleh, '*Commercial Arbitration in the Arab Middle East*' (2nd edn, London, Lexgulf Ltd, 2008) 1- 4
[56] Abdulhamid Al-hadab (n15) 23

the Quran.[57] The Quran dealt with the wonders and truths, which fitted, the world of the unseen.

The idea of the Islamic religion caused a transition in such matters as dealing, judicial authority, and arbitration. Many other things also changed, as J. N. D. Anderson says, "*Islam is a complete way of life; a religion, an ethnic, and a legal system all in one*."[58] In Islamic Law, arbitration is defined as '*the agreement of the two parties to appoint an arbitrator to judge between themselves,*'[59,] i.e., those concerned select a person to arbitrate between them in their dispute. In other words, the interested parties choose someone to settle disputes between them without the intervention of the court.

The Quran, *Sunnah* (the sayings and practices of Prophet Muhammad), *Ijima* (consensus among recognised religious authorities) and *Qiyas* (inference by precedent) form the Sharia principles. The Sharia provides a foundation of principles that apply to arbitration as well. Legislative prescription for arbitration can be derived from the Quran and prophetic traditions.[60]

In the Shari'a, arbitration is mainly recognised as a dispute resolution method in family matters. For example, the following verse was prescribed for arbitration as the primary method to resolve a marital dispute:

> *"If ye fear a breach between them, appoint (two) arbitrators, one from his family and the other from hers; if they wish for peace, Allah will cause their reconciliation; for Allah has full knowledge and is acquainted with all things."* ***[61]***

On the other hand, the Holy Quran stated in 'Ayah 65' in the same verses 'Surah AL-Nisa' stressed the importance of submitting disputes arising between Muslims to Prophet Mohammed (Peace and prayers be upon him) to arbitrate between them;

> *"But no, by your Lord, they can have no Faith, until they make you (O Muhammad SAW) judge in all disputes between them, and find in*

[57] Ibrahim Draig (n7) 20

[58] JND Anderson, '*Islamic Law in the Modern World. New York'*. (New York University Press, 1975) 209 and see Herbert J. Liebesny, '*The Law of Near Middle East. State'.* (University of New York Press, 1975), 3-4.

[59] Ibn Mansour. *The Lesan al-Arab*, (3rd edn, General Egyptian Institution Copyright 2015) 31-32

[60] Sundra Rjoo, *Law , Practice and Procedure of Arbitration* (2nd edn, Lexis Nexis, 2017) 13

[61] Holly Qur'an Verse 35 of the Sura Al Nisa- explains the Arbitration Agreement

themselves no resistance against your decisions, and accept (them) with full submission." [62]

In this verse, the Quran connects belief with the Prophet's Arbitration in order to avoid hostility and sin among Muslims, for these are the primary purposes of belief and the foundation of faith. Also, arbitration has been mentioned in the Quran in Surat (Sad) Ayah 22:

"When they entered upon David, and he was alarmed by them? They said, 'Fear not. [We are] two disputants, one of whom has wronged the other, so judge between us with truth and do not exceed [it] and guide us to the sound path.' "[63]

The preference for dialogue and conciliation with arbitration extends to different kinds of disputes. During the early age of Islam, the first record of an arbitration arrangement in the Islamic world was that between Ali Ben Abi Taleb and Muawiyat Ben Abi, the governor of Syria, on the succession of the Caliphate, two arbitrators were chosen to settle this dispute.[64] The arbitration agreement stipulated the place of arbitration, the applicable law, and procedural rules together with provisions for the appointment of a substitute arbitrator, similar to a submission agreement in modern commercial arbitration.

Arbitration in Islamic law is limited mostly to financial and commercial matters where private rights are involved. Parties to a dispute relating to property can go for arbitration.[65] The arbitration agreement has to be fulfilled as a matter of principle.

Arbitration clauses are valid as they are necessary for the efficacy of the contract and beneficial to both parties. The Sunnah stresses the legality of arbitration; it is a kind of judiciary but with lesser rank.[66] If arbitration fulfils all its elements, then it is a valid one, and the arbitrator has the right to settle the dispute. It is mentioned in the Sunnah that Prophet Mohammad (Peace and prayers be upon him) once heard people calling someone by the nickname of 'father of arbitration.' [67] The Prophet (peace and prayers be upon him) said to him "*Allah is the only arbiter and He is the only one to judge, so why you are thus*

[62] Holley Qur'an Ayah 65' in the same verses 'Sura AL-Nisa

[63] Holley Qur'an in Surat (Sad) Ayah 22

[64] Abdul Hamid El-hadab 'The Moslem Arbitration Law Arab Comparative & Commercial Law, Proceedings.' Cairo, International Bar Association First Arab Regional Conference, (1987) 15-337

[65] Ibrahim Draig (n49) 20; and Sundra Rjoo (n52) 10

[66] Al-Hārithi, Abdullah ibn Humayd, Al-'Uqud al-Fiddiyya fil Usul al-Ibadiyya, Beirut. *AL-Nahdaa press*, (2009)70

[67] ibid

nicknamed?" the man replied:"*If people dispute about something, they come to me to settle such a dispute*."[68]

The Prophet (peace and prayers be upon him) said: "*That is quite good."* Then he added, asking: "*Do you have a son*." The man answered, "*Yes. I have a boy called Shareeh*". The Prophet (peace and prayers be upon him) said: "*Then, they can call you 'Abu Shareeh*"[69]. Thus, it is clear that the Prophet (peace and prayers be upon him) has approved of arbitration, and hence, it became a Sunnah to be followed and a definite kind of judgment.

The Prophet's Sunnah has confirmed the legality of arbitration, the characteristics of the arbitrator being the judge to a dispute, and the method to be followed by an arbitrator to reach a sound decision to be approved by Allah[70] and His Prophet (peace and prayers be upon him). In this regard, the Prophet (peace and prayers be upon him) said:

> *"I am just a human being, and you come to me to settle your dispute. Some of you may present his case eloquently more than the other, so judge in his favour. So, if I judged someone something he does not deserve, do not take it because it will be his path to hell'.* [72]

The Prophet (peace and prayers be upon him) also said:

> *"Oh, Aly! If two parties to dispute ask you to arbitrate between them, do not accept except after hearing from the two parties equally. If you do that you will be able to judge correctly."* [73]

The arbitrator's position is similar to that of an Islamic Judge (*Qadi*) insofar as this power to issue an award is concerned. In essence, an arbitrator has to have the same qualifications as that of a *Qadi*, both regarding personal and religious character. He should be God fearing and just and must be eligible to be a witness in a court of law.

In doing so, it has long been assumed that women and non-Muslims are restricted from acting as arbitrators, as they are not eligible to serve as *Qadi*. In the year 2012, article 14 of the Saudi Arbitration Law[74] was amended to remove the requirement of nationality, region, gender, or race. Subsequently, the Saudi Administrative Court of Appeal in Dammam in

---

[68] Hadith, Sahih Bukhari and Muslim, Volume 003, Book 050, Hadith Number 874.

[69] Ismail A. Al-Astal Arbitration *'Islamic Sharia, A l-Bukhari in The Singular Literature'*, (1st edn, Daar AL-Nahda Al-Arabiya, 1979) 240

[70] Hussein Mustafa Fathi, '*Sunan Abe Dawad' 'Arbitration according to the Islamic Shari Journal of Arabic Arbitration'* issued by the General Secretary of the Arabic Arbitration Centres. (Hadith No. 3991, 2010),

[72] Hadith, Sahih Bukhari and Muslim, Volume 003, Book 050, (Hadith Number 874)

[73] Hadith, Narrated by Ahmad and Abu Daoud and al-Tirtnidlli, (Hadith Number 878)

[74] See Suadi Arabia Royal Decree No. M/34 articl 14

August 2016 did not object to the appointment of a woman arbitrator, which set a precedent for this practice to change.[75] It remains to be seen whether the appointment of non-Muslim arbitrators will be upheld as well. Nevertheless, non-Muslim parties may appoint an arbitrator of their own choice and qualifications.

The principles of ethical conduct in a man, particularly in matters of conducting commercial transactions, are also applicable to an arbitrator.[76] The arbitrator must consider the contractual obligations in the light of and personal situation of each party in utmost fairness, impartiality, and a deep sense of justice. An arbitrator must strive to do justice to the parties and, in so doing, must follow the procedure.

Under Islamic law, the majority of jurists view an arbitral award as having the same binding effect as a judgment of the Quadi, and it becomes binding as soon as the arbitrator renders it[77]. The award is enforceable by the ordinary Sharia procedural rules. The Quadi can annul the award where it violates the Sharia.

In the modern context, Islamic finance, as an alternative to conventional methods, is a growing commercial industry, with a different set of commercial challenges and concerns. Inevitably, the number of disputes relating to agreements based on Islamic principles wills grow.[78]

However, the various sources and nature of Islamic finance mean that there are far fewer legal experts and judges with the necessary training and knowledge than in the general finance area. Furthermore, the extended use of Arabic words in the Islamic finance vernacular can make it particularly complicated for Western judges. There arose an essential need to balance the principles of Islamic finance in arbitration with international commercial arbitration given its potential regarding the global market and economic share.[79] It answers the need for a dispute resolution procedure that includes Shari'a principles to facilitate the coexistence of different legal principles.

---

[75] Mulheim H. Alrnuhim, 'The First Female Arbitrator in Saudi Arabia', (September 2016), Kluwer Arbitration Blog Aug 29, available at: http:/ /kluwerarbitrationblog.com/2016/08/29/the-first-female-arbitrator-in-saudi – Arabia accessed in 7 October 2017

[76] Sundra Rjoo (n52) 13- 16

[77] Saied Mahmoud, '*Ordinary Arbitration in the Islamic Sharia and the Kuwaiti Law*', (1st edn, Kuwait University Press, 1992) 162

[78] Ismail A. Al Astal (n58) 240

[79] S. Saleh (n42) 80

As a general condition for the validity of contracts under the Shari'a, arbitration agreements must be in writing.[80] Under the Shari'a, minors, the insane, bankrupts, and, in some versions, the disabled and terminally ill are precluded from entering into any contracts, including arbitration agreements. Non-Muslims can subject their disputes to arbitration conducted according to Shari'a rules.**[81]**

However, the legality of arbitration in the Holy Quran, Sunna, and unanimity away from the judiciary is quite apparent since the fair verdict "even if it was just"'. Arbitration, mediation, and conciliation and the authentic proof are embodied in the verses of the Holy Quran:[81]

> *'if two parties among the believers fall into the quarrel, make ye peace between them. But if one of them transgresses beyond bounds against the other then fight ye (all) against the one that transgresses until one complies with the Command of Allah, but if one complies then make peace between them with justice and be fair; for Allah love those who are fair and just.' [82]*

Islamic Jurisprudence permanently aims to assist people's affairs, and consequently forbidding arbitration contradicts Islamic Jurisprudence. Before Islam, many people considered arbitration as a legitimate agreement. Islamic versions do not oppose this belief[83]. However, arbitration should be statutory and safe under Islamic Jurisprudence, and the proof is taken from the Quran, Sunna, common consent, and analogy.

2.5 Recognition and Enforcement of an Arbitral Award under Sharia law

The Quran and the Sunna are sources of legislation in Islamic law; both motivate and urge parties to arbitrate correctly whenever there is a dispute.[84] It should, however, be noted that there is a conflict between Islamic rules and Secular law in respect to arbitration, particularly

---

[80] Amir I. al-Shamakhi,' Kitāb *al-Idāh*' (1st edn, AL maktaba Al- Watatniya, 1971),

[81] Saied Mahmoud (n77)

[81] Al-Hārithi, 'A. Humayd, Al-*'Uqud al-Fiddiyya fil Usul al-Ibadiyya*, *Arbitration Contract in the Islamic Sharia and the Secular Law'* (2nd edn, Beirut. AL Makatea Al Watatniya, 2009) 159; Muhsin Shafieg, '*International Commercial Arbitration'*, (3rd edn, Cairo, Dar Al Nahda AL Arabiya, 2015) 103; Fawzi Mahmoud Sarni- International Commercial Arbitration. (5th edn, Jordan Dar AL Thaghafa Library for Publication and Distribution, 2011) 23

[82] Holly Qur'an Verse 62 Surat AL Ilugrat

[83] AL Khair Gashi 'D*ifferences Between Arbitration Methods for the Settlement of International Disputes*'. (1st edn, Khartoum University Institute for Studies, Publication and Distribution.1999) 504

[84] Abdul Hamid El-Ahdab, '*Arbitration with the Arab Countries*' (3rd edn, London, Kluwer Law International, 2011) 62

in the subject of recognition and enforcement of awards.[85] For example, under the New York Convention of 1958 awards are subject to interest (*riba*) and are enforced by domestic courts, contrary to the Islamic law of Sudan and most of the Arabic and Muslim countries.

An award will not be recognised and enforced since Sharia law prohibits interest under all the Islamic Schools (*Mazahib*). Such conflicts between non-Islamic laws and Islamic law are an obstacle to the recognition and enforcement of foreign arbitral awards in Sudan and most of the Muslims Countries. Therefore, it is necessary to harmonise the secular and Islamic law approaches[86]. The paradox is that the harmonization may take a long time to apply. It may work, but in practical terms, it is subject to Islamic influence and its supremacy in Sudan may not being denied that, and therefore it may not work[87]. The notion of arbitration is well based in the Quran; for example, the Holy Quran requires all Muslims to comply with their contractual obligations:

> "*Oh, ya who believe; Fulfill (all) obligations''*,[88] also, sharia law guidelines in Arbitration agreements are binding contracts. The Koran states: ‘*'O ye who believe; respect your contractual undertakings*.''[89]

Further validation and illustration have been provided for this by Sauna (the acts and sayings of the prophet Mohammed (peace is upon him)).

The Prophet has said it;

> *'Muslims must respect their contractual undertakings except those which prohibit what is authorised or those which allow what is forbidden because the rule is that the act of disposition of any person must be performed as was agreed if such person can dispose of its property and if the object of the contract is legal*.'[90]

By this evidence, *Ibn Tamiya*, one of the scholars of the Hanbali school,[91,] made it more explicit by stating that the rule in contracts is tolerance and validity, and one must only forbid

---

[85] Albert Jan van den Berg. '*When Is an Arbitral Award Non-Domestic under the New York Convention of 1958*?' 6 Pace Law Review 25, (1985-1986) 39

[86] Ibn Mansour. The Lesan al-Arab, (3rd edn, General Egyptian Institution Copyright, 2015) 31-32

[87] Hussein Mustafa Fathi, Sunan Abe Dawad, Hadith No. 3991 , (2010), A research titled Arbitration according to the Islamic Shari Journal of Arabic Arbitration- issued by the General Secretary of the Arabic Arbitration Centres

[88] The Holy Quran Surat Almaid verse 51

[89] The Holy Quran Sūrat l-Māidah verse 1

[90] Sahih Albokhari, '*The Prophet said that Muslim are Bound with their Agreement*' Ibn Hager Fath Al khadir vol, IV, 451

[91] Ibn Taimiyya: AL Fatawa, part 3, p326.

or set aside those contracts which are prohibited by text or of "Qiyas" (reasoning by analogy).[92] He explained that the Quran authorised what it did not prevent. Consequently, that what is not banned is not illegal, and what is not mistaken is valid[93]. Therefore, many types of new contracts and various types of contractual clauses, including arbitration clauses that have been brought into existence by modern civilisation are legal and binding.[81] The most critical requirement for forming a valid arbitration agreement is the full and correct consent of the parties. Therefore, invalid consent results from the invalidity of the agreement. Furthermore, the clause is invalid only if it is contrary to the purpose of the contract. For example, if it is prohibited by the text or by the purpose of the contract.

2.6 The Forms of Arbitration under Sudanese law

In the last decade, the uncertainty towards arbitration in Sudan has steadily disappeared.[94] The last few years have witnessed two critical features related to arbitration practice: first, Sudan recognised arbitration as a mechanism for dispute resolution in her national laws. Second, Sudan ratified the New York Convention 1958 and permitted some other regional enforcement of judgments and arbitral award treaties. After Sudan was recognised as a sovereign state, they began to develop infrastructure and stable financial and investment markets. This economic progress led to the establishment of a range of new national laws, including the Arbitration Acts of 2005 and 2016. Also, the joining of the New York Convention was a crucial step forward.

The crucial issue for Islamic law where most modem arbitration systems are concerned relates to the choice of law clause, which must state that awards must be in line with Islamic principle[95]. The attitude of the Sudanese Arbitration Law appears to be following the awards of Islamic Jurisprudence. This is indicated by general Sudanese Laws, which also adhere to Islamic Jurisprudence.

---

[92] Abd al-Razzaq Ahmad Al-Sanhuri, *'Sources of Law in the Moslems Fight*', *Cairo, Daar ALFikir ALarbya*', (1st edn, 1988) 80

[93] Ibid

[81] Ibid

[94] A.Gashi *'The difference between Arbitration Methods for Settlement of International Disputes'*, (3rd edn Kartoum, University Institute for Studies, Publication and Distribution, 2017) 409

[95] Saied Mahmoud, '*Ordinary Arbitration in the Islamic Sharia and the Kuwaiti law'*, (1st edn, Kuwait University Press, 1992) 162

The Sudanese Arbitration Act 2016 does provide that the award should not differ from the awards of Islamic Jurisprudence. Article 42 (3) of the 2016 Act provides that:

> "*The appeal court may adjudge the nullity of the award, of its own motion, if the award contravenes with public order in Sudan.*"[96]

The provision of enforcement of Article 47 d the Sudanese Arbitration Act 2016 provides:

> *''The award, or part of it, is not contrary to public order in Sudan. The court shall execute what is compatible with public order while abstaining the part that contradicts with public order.''* [97]

From these articles, it can be said that the approach of Sudanese Arbitration Laws focuses on the final decisions of arbitral awards that must not be contrary to Islamic principles. These are the articles of law, but how about the practicality of applying them?

It has been said that provisions applying to arbitration in Sudan are Sudanese Law, whether arbitration is domestic or international. In this case, the enforcement of an award that is rendered in Sudan takes into consideration the public order of Islamic principles; this view requires suggesting the following. First, the Sudanese Arbitration Act, Articles, and provisions of enforcement provide that arbitral awards should not confront Islamic principles and must be satisfactory for enforcement in Sudan. These are articles leading to awards the final decisions of which must comply with Islamic jurisprudence. Second, the Sudanese Arbitration Law and its provisions of enforcement do not modify the arbitrator or arbitral tribunal's determination of suitable laws for the existing dispute to consider the Islamic Jurisprudence principles.[98] Third, determining that the arbitral award is not inconsistent with Islamic principles depends on the lawyer's skill or his knowledge of Islamic awards and his relevant experience regarding enforcement.

The creation of Sudanese arbitration practice and reference to arbitration outside Sudan does not fit in with the current practice of Sudanese law,[99] but rather the character and history of world arbitration centres which have an essential function in attracting investors to resolve their commercial disputes.

---

[96] see Arbitration Act 2016, art 42 (3)
[97] see Arbitration Act 2016, art 47 d
[98] Ibrahim Draig (n47) 100-102
[99] Mohamed M. Adam, '*Enforcement of Foreign Judgments in the Sudan*'. (Dr Adam & Associates, May 2015) 70

On the other hand, Kamil Idris does not seem to be right in his hypothesis when he noted that:

> *"in several cases, the understanding of public order has been established in a pervasive way, usually declaring that an arbitration made abroad which applies a foreign law is opposed to public order ...."*. [100]

This researcher believes that the statement is not correct and needs further explanation. The notion of the public order of sharia law is clear and governed by Islamic jurisprudence stipulations proved by the Quran, Sunna, and Consensus.[101] To assume that arbitration taking place outside Sudan, where foreign law is applied, is contrary to Sudan's public policy cannot be held on the grounds of the following.[102] Sudanese Arbitration law does not provide such restrictions, and second, the approach of Islamic Jurisprudence allows and has scope for modern legislation, both domestic and international, which above all must not confront the general principles of Islamic Jurisprudence.[103] Islamic Jurisprudence does not require that arbitration be declined just because of its foreign origin. Arbitration would be accepted, whether it is national or foreign, provided that it is not contradictory to Islamic Law.[104] This point is already incorporated into Sudanese arbitration law. It would seem that the direction of Sudanese Arbitration law in this regard is to be justified since it permits the arbitrator or arbitral tribunal to determine the most appropriate rules to resolve the dispute referred to them, taking into account Islamic aspects of arbitral awards.

This highlights what has already been noted regarding the need for the arbitrator or arbitral tribunal to know arbitration through mastering the notion of the public order applicable in a particular country.[105] This also stresses the significance of understanding Islamic arbitration award systems, particularly those of a commercial nature.

Article 3 of the Arbitration Act 2016 explicitly specifies that arbitration should be consensual. Disputing parties are not obligated to go into arbitration. This provision means

---

[100] Edris Kamil , *Practical and Legal Structure and Vision on Arbitration Act 2005* (AL Daar AL Sudaniya, 2006) 90

[101] Mustafa M. AL lammal and A Kasha M. Abdulla *Arbitration in Internal and International Special Relations* (1st edn, AL lialabi legal Publications, 1989) 109

[102] M.Tijani, 'International Trade in Arab Countr'y (2014) Journal of international Arab Arbitration, 1st edn Volume 6, 22

[103] Mutasim Hassan Mahjoub , 'The Problems of the New Law' Paper presented in the seminar held in Kartoum on 26 October 2016 in the light of new Arbitration Law 2016

[104] Saied Mahmoud (n67) 189

[105] Mahmood Mukhtar Barbara, '*International Commercial Arbitration'*, (2nd edn, Daar Al Nahda al Arabiya, 1999) 102-104

that arbitration is a private matter and is not connected to any standard that promotes arbitration. The parties are the ones that determine the time and place of the arbitration proceedings[106]. These must be carried out in private since commercial parties prefer to preserve the confidentiality of their business.

2.7 International Arbitration under Sudanese Law

The Sudanese Arbitration Act of 2016 makes an attempt to provide a distinction between domestic and international arbitration. Failure to consider such a distinction has been a weakness of most arbitration systems in the region. For example, it is very unusual for a foreign arbitral award to be enforced under the arbitration system of the Kingdom of Saudi Arabia and Sudan, due to the lack of flexibility of the arbitration legislation in those countries, because their law deals with international arbitration with the same procedures and rules regulating domestic arbitration. This has had a significant adverse effect on the creation of the arbitration system in those countries. However, over the last 50 years or so, the international community has increasingly embraced arbitration, with many understanding its importance as the primary means of resolving complex, transnational, disputes, as well as the economic benefits viewed as "arbitration-friendly" for a state.

However the parties to international commercial arbitration are allowed under article 7 of the Arbitration Act 2016, to conduct the arbitration proceedings in accordance to this Act. The Act defines international arbitration as arising wherever the subject matter of the dispute is related to international trade, in one of the following cases:

> *(a) "where the headquarters of the business of the arbitration parties' business is in two different states; (b) where the subject of dispute, included in the arbitration agreement is connected to more than one state."* [107]

According to this provision, it can be said the Sudanese law applies two criteria to defining whether arbitration is international or not: first, whether or not the subject of international trade is included, and second, the geographical standards of whether the place of the arbitration agreement is located in one or more countries[108]. The basis for such a provision, however, is not clear. In this regard, Sudanese law aims to conform with the laws of Saudi Arabia and Egyptian Arbitration, as many of the provisions of the current Act have been

[106] Ibid
[107] See Arbitration Act 2016, art 7
[108] Edris Kamil (n78)

heavily influenced by the laws of those countries.[109] On the other hand, the current Act does not provide that the parties must expressly agree that the subject matter of the dispute is related to more than one country if the arbitration is to be considered as international.

That said, Sudanese law does not provide for a criterion to determine that the subject-matter of a dispute is connected related to more than one country.[110] The Arbitration Act 2016 provides in article 7 that arbitration is 'international' within the scope of this article if the matter thereof relates to international trade. In defining 'trade' in the Arbitration Act, the law has followed the modern standard, which is the standard of the economic nature of the seat of arbitration.

In this case, where the head office of the parties to the arbitration is located in two separate countries, the relevant centre is the one which is most closely linked to the subject matter of the arbitration agreement.[111] In the event of none of the parties having a business centre, and then the usual place of the residence of the parties shall be counted.

The parties to an arbitration may agree to resort to a permanent arbitration organisation or an arbitration centre having headquarters in Sudan or abroad for example: to refer the dispute to the Cairo Regional and International Commercial Centre for Arbitration, or the International Chamber of Commerce in Paris.[112] If the subject within the dispute is included in the arbitration agreement and is connected to more than one state, and then the dispute is related to transnational trade, that is, it is arising from a relationship beyond the geographical borders of one state[113]. If the head offices of the parties to the arbitration are located in the same state at the time of concluding an arbitration agreement, and one of the following places is situated outside of that country, then the place can be chosen as the seat of arbitration in the

[109] Mohammed A. Farah, '*The Necessary Substantive Rules for an Arbitral Award*', (1st edn, Khartoum University Press, 2017) 112

[110] M. Taha, Abosamra. *Arbitration in Boot, Sudanese Law Reform*, (AL Daar AL Sudaniya, 2005) 34

[111] Ibid page 27, he cited further: "This idea is derived from the United Nations Convention on the International Sale of Goods - Vienna 1980, which relied on Business Centre for the parties to the sale and it is in the process of determining the international status in the first article, which stipulates that 'if the parties to the arbitration do not own a business centre, the usual place of residence is put into consideration. In this case a comparison is made between this counter status of the other party or place of the habitual residence and the business centre of the other party or his usual place of residence as to its location in the same country or not' "

[112] Abu Zeid Rudwan (n27) 154. This case is added by the Sudanese law to the three cases stipulated in the model law of arbitration, and intended by this provision to internationalize the parties agreed to the Centre or the permanent arbitration whether to these centre for sponsoring the procedures of arbitration or for appointment an arbitrator by to its regulations to the judge in the matter of the dispute.

[113] Ibid

arbitration agreement.[114] Alternately, it can be the place in which an essential part of the obligation arising from the commercial relationship between the parties is performed; or the place most closely linked to the subject matter of the dispute, and this is a relative matter which varies from one case to another.[115]

Article 7 of Arbitration Act 2016 has taken such instances from the Model Law without any change and has added the general standards of internationality, i.e., to relate to transnational trade.[116] Also, it was added to the second paragraph that if the parties preferred to refer it to one of the centres or permanent organisations of arbitration, then arbitration could take place in the foreign state. However, Sudanese law treats international arbitration in a similar way to domestic arbitration. For example, when court intervention is needed, domestic arbitration cases are referred to the Court of Appeal, under the Arbitration Act 2016, while the cases of international arbitration, regardless of whether the arbitration proceedings took place in Sudan or outside of it, are also held by the Court of Appeal.

2.8 The Nature of Arbitration

It is necessary to examine the nature of arbitration arising between the parties' agreement and any consequential effect.[117] Arbitral awards have the same force and importance that is given to courts' judgments.[118] It has given little space for litigants to null an arbitral award or attempt to hinder its enforceability. However, article 42 of the Arbitration Act 2016 provides considerable scope to the appeal courts for the conduct of auditing and the examination of foreign arbitral awards and this has undermined the arbitration system. Also the Act includes a list of grounds for refusal of enforcement, including the granting of review powers to appeal courts and the examination of the procedural aspects of an arbitral award.

Arguments have arisen among scholars regarding the determination of the nature of arbitration, and the reason for the controversy surrounding arbitration is that arbitration is a contractual system in its initiation and judicial in its function. Some of those scholars[119]

---

[114] Ahmed M.Abdel Badi Sheta, '*The Arbitration an Explanatory and Comparative Study of Judicial Provision & Arab and International Arbitration Institute'* (3rd edn, Daar AL Nahda Al-Arabiya, Cairo, 2009) 96-97

[115] Ahmed E. Eljaali, *Sudan Arbitration Law 2005 and Need for Reform.* (AL-Daar AL-Sudania, 2013) 17

[116] Ibid

[117] Alan and Martin Hunter, '*Law, and Practice of International Commercial Arbitration*' (2nd edn, Sweet & Maxwell, London, 1991) 29; Mahmoud M. Barbara. (n86) 11

[118] Ahmed M. *Sheta.(n 92*) 23

[119] J. P. Niboyet *Traité de Droit International Privé Français*, (Recueil Sirey, 1949) 403, Dalloz, Recueils Dalloz et Sirey *De doctrine, de jurisprudence, et de legislation,* (Jurisprudence générale Doloz, I948) 125

mentioned that arbitration is contractual, whereas others adopted an intermediary attitude and viewed the arbitration system as a mixture of the two.

2.9 The Theory of the Contractual Nature of Arbitration

Supporters of the contractual nature of arbitration believe that arbitration is a contractual deed emanating from the agreement of the two parties to refer their dispute to arbitration rather than to the national judiciary.[120] Arbitration is based on a contract. Thus, it is an outcome of a contract.

The relationship between the disputants' interest and between the disputants and the arbitrator is governed by the implied and express terms of the agreement to arbitrate.[121] If parties choose an arbitral institution, it has been stated that their relationship with that institution is contractual.[122] They do not consider arbitrators as judges but delegated persons to perform agreements of the two parties and that the will of both sides to refer to arbitration makes the arbitration of a contractual nature. Additionally, the parties assume to accept the arbitrators' awards by agreeing to accept such an award. Niboyet argued that:

> "*Arbitration awards have a contractual nature, as the arbitrators do not hold their power from the law or judicial authorities but the parties' agreement. The award is thus impregnated with a contracting character and. According to the law, it appears to be the work of the parties, it must have, as with all agreements, lawful effect, and it must possess the authority of a final judgment."* [123]

The fact is that the characteristics of arbitration, such as the expeditious resolution of disputes, confidentiality and the arbitration of a non-judgmental person, is a consequence of the contractual nature of the arbitration.

By way of comparison the French Court of Cassation confirmed the contractual nature of arbitration when it provided in its judgment of July 27 /1937 that:

> *"The arbitral award issued by the convention of arbitration should be one unit with this convention of arbitration and together share its contractual nature."*[124]

[120] K.S. Carlton.'Theory of the Arbitration Process' USA, The Harvard Law Review Association (1972) 631

[121] Ibid

[122] Redfern and Hunter, 'International Arbitration, International Arbitral Awards and Settlement Agreements', (1988) JCI Arb. 54127- 6

[123] J. P. Niboyet '*Traité de Droit International Privé Français*' (Recueil Sirey, 1949) 403

[124] Court de Appel de Cean, 22 October 1960, 596

The French judiciary followed the same method even in its recent judgments, thus stressing the contractual nature of arbitral awards, whether rendered in France or a foreign country.[125] Even if the country of origin gave the foreign arbitral award a binding force, it is still not considered a judicial judgment.

The Sudanese judiciary supported the nature of the agreement of the provisions of arbitration as the Sudanese Court of Appeal rendered in some of its judgments that:

> *"Arbitration is an exceptional procedure stipulated by the legislator to settle disputes outside of court, with all the guarantees it provides with, and therefore arbitration is limited to the will of the disputants in submitting it to the arbitral tribunal"* [126]

The Sudanese legislators like some others legislators preferred this theory and relied on their interpretation of the arguments that the basis of arbitration is the 'will' of the parties, which stems from their desire to settle disputes on a friendly base[127]. The judiciary aims at the public interest, while arbitration aims at achieving the personal interests of the parties to the arbitral agreement[128]. Besides, the state does not appoint arbitrators, and the rules that apply to the judges do not apply arbitration. The authority of arbitrators who are engaged in the arbitration process stems from the will and agreement of the parties.[129]

Arbitral awards under the Sudanese arbitration system do not enjoy the same authority regarding their enforcement as legal judgments but need to be enforced by the state judiciary.[130] In addition, the nullity of an arbitral award is made through actions for nullity, contrary to court judgments. The arbitration system is considered as one of the systems of law that draws strength and produces its results from the arbitral agreement.[131] However, the contractual theory does not clarify why arbitrators have protection against being sued or the remedial powers of the State to help the correct functioning of arbitration.

---

[125] Dalloz, Recueils Dalloz et Sirey 'D*e doctrine, de jurisprudence, et de legislation'* (Jurisprudence Générale Doloz, I948) 125

[126] Sud. Appeal No. 4173 issued 21 /6/1999 and appeal No. 1004 (2000) (7 Civil Service unpublished judgment)

[127] Mohamed Osman, *The Enforcement of foreign Judgment and Arbitral award in Comparative Law in Sudan*, (2nd edn, Khartoum University Press, 1997) 52

[128] W. W. Park, *Arbitration of International Business Disputes*, (2nd edn, Oxford University Press, 2012) 365

[129] Adam Samuel, '*Jurisdictional Problems in International Commercial Arbitration*'. (Publications of the Swiss Institute of Comparative Law, 1990), 62

[130] A Redfern (n99) 166 -170

[131] Ibid

2.10 The Theory of the Judicial Nature of Arbitration

The supporters of this theory consider arbitration as judicial, a process through which disputes are settled according to the application of the law. Consequently, the arbitrator is regarded as a judge whose ruling is binding, and as such, he is a substitute for that judiciary.[132] However, the judicial theory supports the allocation to states and their judicial staff the powers of completing supervision over commercial arbitration conducted within their jurisdiction.

They argue that the parties agree to refer their dispute to arbitration instead of the judiciary. They are not abandoning the formal justice system by referring the dispute to another judge. It is, therefore, clear that the significance of this jurisdictional theory is that arbitration derives its power from the authority of law.[133] This theory began to spread, especially after the French State Council rendered judgment on March 17 /1893 in the case of the *North Railways*, where the arbitral award was considered to be a judicial act.[134]

In more than one case, the French Court of Cassation stressed the same meaning where it considered arbitration an exceptional form of a court in which the arbitrator has an independent authority to settle the disputes.[135]

Many French jurists have adopted this theory, led by Professor Mathieu de Boissison, who confirmed the judicial nature of the arbitral award,[136] like any court judgment. An arbitral award is binding on the parties and has the same effect as the court judgments. It must be issued within the limits of the law. Thus arbitration can give award credibility and validity.

The Sudanese Court of Appeal also confirmed the judicial nature of arbitration in certain judgments,[137] when it stated that:

> *"The legislator allows the parties to a dispute to choose to refer the dispute to arbitrators who settle the dispute by decision having the*

---

[132] O Chukwumerije, '*Choice of Law in International Commercial Arbitration*' (1st edn, Quorum Books, 1994) 75-76

[133] Houin, '*Voir au Contaire de Cette Decision Archives de Philosophic du Droit*' Archives of Philosophy of Law. (1st edn, HAL Paris Nanterre Press, 1954) 39

[134] Ibid

[135] Ibid /page 79

[136] Mathieu de Boissison 'L*e droit francais de L'arbitrage interne Et International Edition'* (Recueil Sirey, 1990), 283 and Dalloz (n34) 637

[137] *Esmat Abdul Gabbar Mohamed & Others v. Farid Abdul Gabbar Mohemed*, SC-REV-996-1995 (1995) SLJR 158

same nature as that of litigation and that the arbitral agreement must be based on the legal validity and correct."[138]

Many scholars adopted this theory, and Professor Mathieu argued that:

> "*If we view an arbitration decision as a compulsory binding judgment which the opponents agreed upon, and that it replaces the compulsory state judgment, and that the arbitrator does not work only under the dispute parties will. Then it would be clear that the judicial nature overcomes arbitration and the arbitrator the decision is a judicial act similar to that issued by the judicial authority of the State."* [139]

According to the supporters of this theory, it is evident that arbitration enjoys a judicial nature because of its mission, which is given to the arbitrator, and the arbitrator's judicial duties are considered a fair judgment is binding all parties.

On this analogy, Belgium, Egyptian, French, and Jordanian legal systems lately adopted this theory: but it has been faced with criticism on the grounds of that the arbitrator does not have the authority of the judge who compels the witnesses to attend, as well as the power of enforcing his judgment.

2.11 The Theory of the Mixed Nature of Arbitration

While it is a private process between the parties, eventually, the courts are called upon to enforce the resulting award, and the powers of the courts are required to ensure that parties obey their agreement to arbitrate.[140] Supporters of the mixed theory have toned down the distinction of the contractual and procedural aspects of the arbitration, contenting themselves by indicating the predominance of the contractual features at the beginning of the arbitration process, and the procedural matters once the arbitration proceeding has begun.[141] However, the agreement to arbitrate is a contract and must be treated as such, its validity as a result of determining all criteria suited to contracts. Arbitration proceedings, nevertheless, must be subject to the supervision of the national law and the national courts' jurisdiction. Some maintain that an arbitration clause creates a separate regime in addition to excluding the jurisdiction of the municipal courts.[142]

---

[138] Ibid

[139] Mathieu de Buisson. (n115) 284

[140] A Redfern (n108) 160

[141] Adam Samuel, (n107) 62

[142] Aiste Sklenyte, 'International Arbitration: The Doctrine of Separability and Competence Principle' Docplayer (2003) published in http://docplayer.net/ accessed May 2017

There is a trend in modern law, which considers arbitration as being an independent system rather than contractual, judicial, or mixed. This is because arbitration had been established before an organised judiciary and progressed to its current form after being codified and organised through national legislation, international agreements as well as specialised technical arbitration institutions.[143] Moreover, despite that, the mixed theory still met disapproval for its lack of precision, and it lacked the sophistication to fill gaps in or provide a basis for the improvement of arbitral law.

As for Islamic law, Islamic law considers arbitration as being arbitration by conciliation and not compulsory on the parties to the dispute as well as being not bindingto them in compliance with the Holy Quran[144]:

> *"And if you fear dispute between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it to them. Indeed, Allah is ever Knowing and Acquainted [with all things]."* ***145***

This is interpreted to mean that there shall not be an arbitration award except through the unanimous agreement of arbitrators and shall not be final unless accepted by the parties to the dispute. Therefore, an arbitration award is only valid as concerns parties' rights through their consent and endorsement of the judge.[146] Secondly, their view is that the arbitration award is binding according to the Holy Quran:

> *"Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and seeing."*[147]

According to most scholars, arbitration is judicial, and accordingly, they see the requirements in the judge are the same as that of the arbitrator. Even though arbitration, in their viewpoint

---

[143] Ibid

[144] Mulheim H. Alrnuhim, 'The First Female Arbitrator in Saudi Arabia', (September 2016), Kluwer Arbitration Blog Alugt 29, available at: http://kluwerarbitrationblog.com/2016/08/29/the-first-female-arbitrator-in-saudi – Arabia accessed on 7 October 2017

[145] Holly Qur'an, Surat AL Nisaa - Verse 35

[146] Abdel Hamid AL Minshawi, '*Arbitration in Internal and International Special Relations*' (3rd edn, Daar Al Fiker Al Arbi, 2010) 44

[147] Holly Qur'an, Surat AL Nisaa - Verse 58

is inferior in status to that of judicial jurisdiction and also due to the inability of the arbitrator to compel witnesses to attend.[148]

2.12 Party Autonomy in Arbitration

An arbitration agreement means an agreement to refer to arbitration, either current or future disputes. Parties have autonomy in conducting and enforcing such arbitration agreements[149]. It is essential to that autonomy that the parties to an arbitration agreement are free to choose and regulate the rules and methods to govern the arbitration.[150] This may involve the appointment of the arbitrator, suitable substantive law and the seat of arbitration.[151] The principle of party autonomy also allows parties the freedom to choose the procedure to be applicable in their arbitration. However, these must not run counter to the relevant provisions in the national law of arbitration.

Article 4 of the Arbitration Act, 2016; provides that the parties to the agreement are free to agree on the process to follow by the arbitral tribunals in handling the proceedings. Moreover, the principle of party autonomy is further established in Article V (1)(d) of the New York Convention which empowers a court to refuse enforcement or set aside an award if the party resisting enforcement establishes that '*the arbitral procedure was not by the agreement of the parties*'.[152]

However, there are limits to party autonomy principle controlled or limited by law. Article 3 (3) of Arbitration Act 2016, stated that the constraints on party autonomy are the parties' failure to agree, mandatory natural justice principles, mandatory procedural laws, institutional requirement, arbitral discretion, and the supervening role of the court.

Law should also preserve party autonomy by permitting parties to reject an arbitration agreement. Thus, the law must strengthen party autonomy by requiring them to refer disputes to arbitration where they have a valid arbitration agreement that has not been mutually declined.[153] Where there is a valid arbitration agreement between the parties and one party

[148] In the Sudan it is usual to find some judges hearing more than twenty suits per day. Some of them are preliminary whereas the others are at a stage of advanced procedure.
[149] Abdul Hamid El-hadab '*The Moslem Arbitration Law Arab Comparative & Commercial Law, Proceedings*', International Bar Association First Arab Regional Conference, Cairo (1987) 15-337
[150] Sundra Rjoo (n52) 620
[151] William W. Park, '*Arbitration of International Business Disputes*' (2nd edn, Oxford University Press, 2012) 101
[152] Schmitthoff, '*The Jurisdiction of the Arbitrator*' (Schultsz J. and van den Berg A (eds), *'The Art of Arbitration'*. Kluwer, 1982) 285
[153] William W. Park (n130)

proceeds to the court for litigation, if the other party submits the valid arbitration agreement to the court, the court should stay any action taken before it if the matter is subject to an arbitration agreement[154].

2.13 Party Autonomy in Domestic and International Arbitration

International commercial arbitration does not function in a vacuum; therefore, it should be connected to the legal system of a particular country. In some cases, more than one legal system may have an operative role in arbitration, the law of the seat of arbitration, and that of the country of enforcement.

However, most States have a dual system;[155] and there are two attitudes of rules governing each character of arbitration.

The first deals with merely domestic arbitration, while the other proceedings with international arbitration. The purpose of this is that, while there is no real international law required in each country to accept those particular relations such as an international element are subject to specific regulations,[156] and it is unsuitable for the country to apply its national arbitration law to cases with an international essence.

The legal system that is deemed suitable to nationals of a particular state is not always suitable for parties who are not nations of that state.[157] Countries that have similar arbitration laws that are applied to both domestic and international agreements cause the risk that justice will not be executed. Therefore, the Model Law of International Commercial Arbitration was formed.[158]

The main distinction between the rules applied to domestic arbitration and those used in international arbitration is that international arbitration is more flexible than domestic arbitration.[159] The party autonomy principle in the context of international commercial arbitration, in most cases, is more extensive than that of domestic arbitration.[160] The basis for this is that the national rules are established to apply to those matters which deal with the nationals of that country.

---

[154] A Redfern (n127) 301
[155] For example the French Arbitration Act 1998
[156] R. David *'Arbitration in International Trade'* (Kluwer Law and Taxation Publishers, 1985) 70-72
[157] Ibid
[158] Ibid
[159] Sundra Rjoo (n129) 633
[160] Ibid

On the other hand, international cases deal with parties who originate from different backgrounds; therefore, it is hard to suppose that they will know the legal system of other countries well[161]. In order to avoid obstacles, countries should implement international standards subject to the provisions of international agreements concerning arbitration, to which Sudan is a party: Article 3 of Arbitration Act 2016 stated that:

> "*(1) the provisions of this Act shall apply to every arbitration conducted in Sudan, or abroad where the parties thereof have agreed to subject the same to the provisions of this Act whenever the legal relation is civil, whether contractual or non---contractual (2) subject to the provision of section."*[162]
>
> *2, the provisions of this Act shall apply to every arbitration, which is existing at the time of coming into force of this Act.''*[163]

The difficulty that may arise in this provision is because arbitration may be regarded as domestic in one state but international in another. What is the accepted standard in defining "international"? There is no similar rule in this regard. There are several elements relating to the definition of arbitration[164]. In order to extend the scope of international commercial law, specific arbitration laws, such as the Model Law, allowed more than one measure to determine the status of arbitration.

Where party autonomy in international commercial arbitration is concerned, it is vital to distinguish whether arbitration is domestic or international. The identity of arbitration there, whether domestic or international, plays an essential function in international commercial arbitration.[165] The standards used differ from state to state. Specific national laws regulate such a linear system that they describe arbitration as domestic law based.[166]

It is vital to mention that the interpretation by the state courts of international commercial arbitration is also crucial. Most courts in Sudan are not familiar with arbitral proceedings in relation to international commercial arbitration, only those in domestic arbitration. This researcher would suggest that this approach is globally accepted as one of the principal reasons why parties to arbitration prefer the arbitration method to avoid the complications of court litigation and the intrusion of a legal system brought in by a single national court. The

[161] R. David (n140)
[162] Arbitration Act 2016, art 3 (1) and (2)
[163] Arbitration Act 2016 art 3 (3)
[164] Schmitthoff (n137) 121
[165] David R.(n135)
[166] Ibid

more the court imposes on the arbitral proceedings, the more limited the intent of the parties to arbitration is affected.

2.14 Conclusion

Arbitration was part of traditional Sudanese society even in early times, and this has also contributed towards it facilitating a modern method of dispute resolution in the Sudanese arbitration system. The modern approach of this practice is relatively new, and so academic analyses on the subject are somewhat inadequate. As M. Abo Samra noted, "*till relatively recently, not sufficient work in Sudan has been done toward establishing the law and practice of customary arbitration in a decent view".*[167]

In this chapter, a critical review has been carried out regarding the background to, and the formation of arbitration law rules applied in Sudan during the period between 1983 until the Arbitration Act 2016 was issued. However, the Sudanese arbitration system witnessed some progressive and radical changes. The approach adopted lacked simplicity. Prior to that, the Arbitration Act 2005 was not a stable driver for many of the significant foreign investors in Sudan.

Sudan was governed by the Ottoman Empire until 1914 and ruled by Islamic law. Therefore, arbitration has been known to and accepted in Sudan for decades.[168] However, transnational arbitration was not experienced in Sudan until 1984 when Sudan subscribed to the Riyadh Arab Convention on Judicial Cooperation and began to enter into extensive trade relations with the Arab states and some neighbouring African countries. Therefore, disputes arose under many commercial contracts. The results of arbitration in these disputes were not in the Government's interests, which resulted in an unfriendly decision by the government regarding arbitration.

The economic growth in Sudan is mainly realised by the increase in the agricultural and oil industries. This phenomenon spread the need for commercial arbitration in the country. Private foreign investors favour arbitration over litigation since they do not want to accept the judicial system of a country that they are not confident with.

[167] Mohammed Taha Abosamra, '*Arbitration in Boot, Sudanese Law Reform*' (Al-Daar Al-Sudania, 2005) 210
[168] Abdullahi Ali Ibrahim, (n42) 532

Moreover, Sudan enacted her arbitration laws based on Egyptian law and that of some Arab States as a result of which it was inconsistent with the UNCITRAL Model Law. The first specific section for arbitration and conciliation were included in the Civil Procedure Code 1983. The form of provisions in the Civil Procedure Code 1983 formulated the concept of arbitration in Sudan. Those provisions enabled the government to progress with the arbitration in order to settle disputes with commercial organisations as well as those between commercial companies. The law was issued before Sudan joined the ICSID Convention.[169]

From the above discussion, it is evident that the Sudanese arbitration system experiences a number of problems. There are serious obstacles relating to the law and regulations; however, there are other concerns which are complex and deep-rooted. Nevertheless, amending and updating the law might resolve those matters, which are related to the law and regulations. On the other hand, some other issues, such as those related to cultural perspectives and the lack of training in arbitration may need time.

[169] Ibid 543

Chapter 3 A Critical Examination of the Sudanese Arbitration Act 2016

3.1 Background

Historically, the majority of civil cases decided by the Sudanese courts are based on English law principles; this was so because "justice, equity and good conscience" is included in them.[1] The courts soon began to reject legal principles other than the English ones.[2] This fact is hardly surprising as most of the Sudanese legislation was passed in the 18th century, during the colonial period. In contrast, the traditional arbitration system was rooted in the Islamic custom and laws and that arbitration system provided for dispute resolution through informal means[3].

The Sudanese legislation used arbitration as a dispute settlement mechanism for decades. The legislator could cope with the rapid development in the field of commercial relations between firms and individuals, whether in Sudan or abroad.[4] That was the case with judicial institutions engaged in arbitration. However, the whole matter of arbitration had been firmly operated in Sudan for decades, and its international importance became evident after Sudan gained her independence in 1956.

After the sovereignty of Sudan, different provisions regarding arbitration and mediation were incorporated into the Civil Procedures Act, 1974, and Civil Procedures Code 1983. Although a significant part of the Sudanese legal system was much influenced by English law and constructed according to the English legal system, the arbitration provisions in the Civil Procedure Code 1983 did not follow the English statutes; therefore, most of the authoritative English cases that were interpreted as reference provisions were no longer valuable or applicable.

[1] Tomas Hodgkin, '*Nationalism in Colonial Africa'.* (1st edn, Muller, 1962) 60

[2] Ibid 28

[3] H. Mahassini, *'General Principles of Islamic Law relating to International commercial arbitration'* (The ICC International Court of Arbitration Bulletin, Special Supplement, 1992) 3 (1) 21, 23.

[4] Kamil Idris. '*Practical and legal structure and monetary vision in arbitration Act 2005'.* (1st edn, Al-*Daar AL-Sudaniya,* 2006) 8

Arbitration provisions in the Civil Procedure Code 1983 had the benefit of simplicity and clarity, but they were a product of an outdated era of arbitration.[5] It provided excessive opportunities for parties to cause delay through the courts' intervention in the arbitral process, which went against the speed and non-intervention preferred by commercial users of arbitration.

However, arbitration has encountered multiple problems. The Sudanese courts have not welcomed the resolution of disputes through extra-judicial means and have interfered with many awards of arbitral tribunals. Besides, arbitral procedures have never met international standards, and there has been a debate to improve the situation. For example, under the provisions of the Civil Procedure Code 1983,[6] the courts have the discretion to set aside an award if an error occurred in relation to the award and such an award would be a nullity. Thus, the court might or might not enforce an award on the grounds that the mistake had vitiated an award.[7] The image of the country is tarnished by the inadequacy of arbitration law in Sudan.[8]

The enactment of a new arbitration law was considered to be a transition in the Sudanese legal system. Although the new arbitration law has some shortcomings, it nevertheless came to render quick and effective resolution of disputes through arbitration or conciliation and reduced the workload on courts.[9] The new law delivered overall positive progress in the settlement system and sped up arbitral proceedings.

Moreover, it is of importance to note the fact that Islamic Jurisprudence accepts the idea of gaining advantages and development from the regulations, cases, and the modern judicatories which advanced countries have adopted.[10] There are examples, in fact, cornerstones for further development of the judiciary.

---

[5] M. Taha, Abosamra. '*Arbitration in Boot, Sudanese Law Reform'*. (AL Daar AL Sudaniya, 2005) 9

[6] Civil Procedure Code 1983, art 146

[7] Civil Procedure Code 1983, art 149: see also. Mohamed Osman, '*The Enforcement of foreign Judgment and Arbitral award in Comparative Law in Sudan*'. (2nd edn, Khartoum University Press, 1997) 52

[8] Husham Ali Sadig, '*The Conflict of International Judiciary Jurisdiction*' (1st edn, Khartoum University Press, 1994) 287

[9] H. Mahassini (n3) 405

[10] M. Taha, Abosamra (n5) 48

This chapter represents a critical analysis of the provisions and use of the current arbitration law in Sudan. It adopts an analytical approach. This approach is based on the exposure of areas of shortcomings and weaknesses in the law. The researcher studied several regional and international arbitration laws that enabled this study to compare the current Sudanese arbitration law with an arbitration system in that Arab world.

3.2 A Brief Overview of the Situation Prior to the Arbitration Act 2005

There was no particular law which regulated arbitration in Sudan prior to the Arbitration Act 2005. Arbitration law was fundamentally dealt with in Chapter IV of the Procedures of Civil Code 1983, under the title of "Arbitration and Conciliation". The detailed provisions of arbitration are explained in 17 Articles (from Article 139 to Article 156). These provisions mainly dealt with national arbitrations and permitted the court to oversee most arbitration in Sudan. The Civil Procedure Code of 1983 granted the courts the right and authority to dismiss any arbitrator, and issue an anti-arbitration order. Under the Civil Procedure Code, 1983, the courts were also empowered to correct, enforce, accept or refuse an arbitral award. The country developed doubts about the Sudanese court system and encouraged arbitration in the country.

Articles 6-4 of the Civil Procedure Code 1983, which were annulled,[11,] did not provide any difference between conciliation and arbitration as separate methods of dispute resolution. This may have been due to the insufficient importance accorded to alternative dispute resolution methods in the Sudanese legal system. For example, Article 141 of the 1983 Code of Civil Procedure refers only to. 'the appointment of arbitrators or conciliators'.[12] This indicates that the arbitration model referred to in the Code of Civil Procedure has not been regarded as a final dispute settlement mechanism. Indeed, arbitration was handled as an alternative method following conciliation and maybe mediation. The use of court interventions in arbitration adversely affected (both disputants and practitioners), it proved to

[11] Annulled by the Arbitration Act 2005

[12] According to the Advisory, Conciliation and Arbitration Service (ACAS), conciliation is defined as 'the act of reconciling or taking together the parties in a dispute with the intention of moving forward to a settlement acceptable to all sides'. According to Tweeddale and Tweeddale, Arbitration of Commercial Disputes, (2007), Oxford University Press, p. 9, the argument always explains the distinctions between conciliation and mediation. Nevertheless, arbitration is a settlement method that has been recognised internationally, and national courts enforce its outcome.

be a sort of discomfort for them. It was simple for the judge or the reluctant party to find any reason to prevent the arbitration process before it started.

Under the CPA, the court had broad powers to set aside the arbitral award:

> *"An award remitted under section 148 becomes void and failure of the arbitration to reconsider it within the time fixed by the court. The parties may apply to have the award set aside on one of the following grounds, namely:*
>
> *a. corruption or misconduct of the arbitrators or of any of them;*
>
> *b. either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrators;*
>
> *c. the award having been made after the issue of an order by the court superseding the arbitration and proceeding with the suit, in accordance with section 144(2) hereof;*
>
> *d. the award having been made after the expiration of the period allowed by the court, or being otherwise invalid. An application to set aside an award shall be made within ten days after the day on which the parties were notified of the award*."[13]

The expression used in Articles 149 (c) (b) and (d) of the Civil Procedure Code 1983, were vague, which made it very simple for the other party to apply for a nullification of the award. The sub-Article (b) grants the other party to nullify the award for misleading of the arbitrator when not considering the overall supervision by the court or by restricting the tribunal to increase the time to render the award or examine the case in hand.[14]

It was planned that the court would play a supportive, guiding, or cohesive role when dealing with arbitration. Courts might support arbitral proceeding by creating injunctive orders to protect the arbitral tribunals' jurisdiction[15]. Courts could also grant injunctive instructions to obstruct the conduct of the arbitral proceedings. The standard practice, however, was that arbitral tribunals should be given the first say subject to a possible court review.

[13] Ground for Setting aside the award, Civil Proceedure Code 1983, art 189 (repealed).

[14] Due to this general wording, lawyers did not observe arbitration as a dispute resolution model. As a result there are not many precedents to guide investors.

[15] S. Jarvin, '*Objections to Jurisdictions in Newman*' (2nd edn, Hill R. Juries Publishing, 2008) 76

Prior to the Arbitration Act 2005, however, the Sudanese courts proved to be unhelpful to an arbitration process. The Sudanese courts' satisfaction with arbitration was expressed by rendering anti-arbitration orders wherever valid and lawful arbitration proceedings were in progress. In many cases, it established its uncooperative attitude by setting aside valid arbitration awards on insignificant grounds. An example in this respect is the case of the Civil, *Almagmou'a Almutakamela (Integrated Group) v. Borahn andother*, [16] where the Supreme Court in Khartoum made an injunctive order, not only against the applicant but also against the arbitral tribunal concerned.

In a similar vein, the Ministry of Justice in Sudan also supported an anti-arbitration injunction, which abruptly led to an unexpected repeal of the Arbitration Act 2005. It established the Arbitration Act 2016, by a presidential decree without approval or review by the National Assembly or by referring it to experts in arbitration matters. Furthermore, the Civil Procedure Code of 1983 (repealed) granted extensive powers to the Court to intervene in arbitration procedures at all stages of arbitral processes.

It is also vital to state that the Civil Procedure Code did not distinguish between international and domestic arbitration. Even though the code was enacted in 1983, it did not impact on the Sudanese system, nor did it borrow any ideas from conventions such as the Riyadh Convention for Judicial Cooperation 1983 and the International Convention for Settlement of Investment Disputes (ICSID) Convention.[17]

The decision to repeal the arbitration provision in the Civil Procedure Code 1983 was followed by several initiatives and appeals for the amendment to the provisions of arbitration in the Civil Procedure Code 1983 and established a new arbitration law which included commercial arbitrations in Sudan. The situation regarding arbitration in Sudan was experiencing various challenges: (i) Sudan did not have a separate law for arbitration along the lines of the UNCITRAL Model Law; the Arbitrations provisions in Civil Procedure Code 1983 did not meet the international arbitrations standards[18]. (ii) in Sudan, the courts

[16] *Almagmou'a Almutakamela (Integrated Group) v. Borahn and other,* Civil Recourse No. 624/1999, Sudan Law Journal & Reports, 1999, 192

[17] Ahmed Bannaga &Emilia Onyema, *Rethinking the Role of African National Courts in Arbitratio*n- *Attitude of Sudanese Courts Towards Arbitration*. (1 st edn, The Netherlands, Kluwer Law International, 2018) 203

[18] Ahmed E. Eljaali, '*Sudan Arbitration Law 2005 and Need for Reform*'. (1st edn, *AL-Daar AL-Sudaniya,* 2013) 12

experienced difficulties in dealing with disputes and issues referred to arbitrations. This was owing to the lack of confidence on the part of judges in Sudan, like many practicing lawyers in Sudan, and (iii) matters connected to language: most commercial arbitrations are communicated and written in English. That may cause some interpretational difficulties for Sudanese judges, lawyers, and experts. [19.] Also, the approved translation agencies mostly did not offer quality translations regarding legal definitions and expressions. Often, interpretations of articles, provisions, and cases were inadequate, and they did not express the meaning clearly. However, a significant part of the regulations in force in Sudan, which have been translated into the English language, needed to be reviewed. (iv) political influence and the weakness of the practice of individuals, and arbitration institutions for the commercial arbitration process, which resulted strangely in Sudan, until recently, not being party to most of the relevant international treaties and conventions related to arbitration let alone the recognition and enforcement of arbitral awards, and (v) a lack of high powered committees, or agencies, composed of academically qualified, competent and experienced lawyers. Ideally, the government would take the lead on comprehensive law reform. However, governments have their concern on this issue.[20]

Despite what has been mentioned above, strengths exist in the Sudanese arbitration system; namely:

- The laws published in Sudan recently supported arbitration as an effective means of disputes resolutions; in order to encourage private foreign investors to invest Sudan[21], for example, the Investment Act, 2015 in Sudan came into being. Any investment dispute that may arise under Article 39[22], allows agreements on the settlement of disputes between the foreign investor and appointing a national and/or a foreign arbitrator.

[19] There was a questionnaire regarding arbitration and English legal language in Sudan, conducted by Ahead Training Centre. Most of the participants were judges, lawyers, arbitrators, and people in the business. They agreed that there were deficiencies and mistakes in the understanding and interpretation of contracts and the texts of laws, which caused damage to the interests of the parties led to delays and made interpretation of arbitral award inefficient and inaccurate.

[20] Mohammed Ibrahim Khalil, (n18) 13

[21] Investment Act 2013, art 39 (1) provides *that; 'If any legal dispute ensues in respect of the investment, it shall be initially presented to the competent court unless the parties agree to refer it to arbitration or reconciliation'.*

[22] Investment Act 2015, art 39 provides *that; 'If any legal dispute ensues in respect of the investment, it shall be initially presented to the competent court unless the parties agree to refer it to arbitration or reconciliation'*

- The fairness and independence of law in Sudan: it is unusual in Sudan for judicial decisions to be affected by political pressures.

However, the Civil Procedure Code 1983 was so rigid to apply to an arbitration process in a modern way; it did not practically hold any importance, it became out-dated to the local commercial world, and ran counter to the interacts of foreign investors. The economic activity at that time was confined mainly to the agricultural sector. Since 1980 the industrial business never reached the size of any significant economic, industrial entities.[23] Legal disputes of a commercial nature were defined as those related to a real estate dispute.

3.3 The Situation after the Enactment of the Arbitration Act 2005

The Arbitration Act 2005 was a vital step forward in the world of arbitration in Sudan. Most of this Act was welcomed in the Sudanese commercial world because the majority believed that the traditional arbitration provisions in the Civil Procedure Code 1983 had failed[24], and had not succeeded in improving the knowledge, practice and culture of arbitration in Sudan. This new Arbitration Law will also have to withstand the protectionist policy operated by Sudan courts which have frequently been known for their interventionist attitudes. The atitude of Sudan's courts, which have had to interpret the Articles of the Arbitration Act 2005, have been an indication that this arbitration law will be subjected to further litigation scrutiny[25]. It was interesting to examine how the courts interpreted the new arbitration law. The commercial world expected that the new arbitration law would usher in a new era for the arbitration system in Sudan; however, this Act has been repealed and replaced with the Arbitration Act 2016, which is discussed in the next chapter.

With the demise of the Arbitration Act, 2005 by the Arbitration Act 2016, basic principles of arbitration now developed and supported the powers of arbitrators in arbitral processes[26]. That connection between the Arbitration Act 2005 and the UNCITRAL Model Law is

[23] Hamdna Allah M. Hassan, '*Economic and Social Development in Sudan 1941-1981*'. (1st edn, *Khartoum University Press,* 1985) 302

[24] Chancellor Hussein A. Abualgasim; the member of the Legislation Committee of drafting the Arbitration Act 2005, Circumstances around the enactment of new Arbitration Law, (2006) published by Sudanese Judicial Judgments Journal, Vo.789 No 109

[25] Ibid

[26] Khalil M. Ibrahim, Problems of Law Reform in the Sudan (1st edn, AL Daar AL Sudaniya, 2013) 24

noteworthy.[27] The ordering of the articles and their expression were like though Sudan did not adopt the UNCITRAL Model Law.[28] Deraig Ibrahim[29] states there is no reason to overlook the fact that the Arbitration Act 2005 is based on the UNCITRAL Model Law.[30]

After a few months of the Arbitration Act 2005 coming into effect, the first judgment based on the law, GNPOC v. Ramsees Engineering Co[31] was issued. This case was referred to arbitration after the application of the parties to the courts following the practice before the Arbitration Act 2005. By the time the arbitral award was rendered, the Arbitration Act 2005 had come into force, and the Civil Procedures Code 1983 Articles 6-4 had been repealed. The award debtor applied to the court to revoke the award under the repealed Section of the Civil Procedure Code instead of the Arbitration Act 2005 as the parties had agreed and proceeded with the arbitration while Article 6-4 was the strict law.[32] The court refused this argument since the Civil Procedure code was already repealed.

The High Court, in this case, however, accepted the notion of the finality of the award, and therefore, the first court of first instance judgment remained. However, the High Court's interpretation of the Nullity application [33] was not supportive of arbitration. It held that although the award debtor cannot challenge the arbitral award unless under Nullity Suit had been filed, the decision of the first instance court in the nullity Suit was subject to all levels of appeal under the provisions of the Civil Procedure Code. This decision of the High Court meant that the procedure the award debtor followed would not be accepted. In other words, the applicant should have followed the conditions of the Nullification lawsuit before this matter was referred to the Appeal Court. In 2007, a new decision was rendered that modified

[27] There are similarties between some provitions of the Arbitration Act 2005 and the UNCITRAL Model Law on Arbitration of 1985 Sections 3 (a)(b) and 31

[28] Sudan is not placed among the countries that have adopted the UNCITRAL Model Law on: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

[29] Dr Deraig Ibrahim is a high legal consultant at the Ministry of Justice. He was a member of the Arbitration Legislators' Committee.

[30] Deraig, from his position at the drafting Committee, believes that the UNCITRAL Model Law influenced the draft.

[31] *Greater Nile Petroleum Operating Co. v. Ramsees Engineering Co* , Civil Recourse 2005 No. 1216/, 2006 Law Journal & Reports, (GNPOC v. Ramsees) pp. 148–151

[32] The Civil Procedure Code 1983 was not following any known international path for the arbitral process. The Civil Procedure Code 1983, arbitration model was drafted locally and therefore, was guided locally by the first instance courts.

[33] Arbitration Act 2005, art 40 grants the award debtor to challenge the award before the competent court following the Nullity Suit process. The wording of this article is similar to that of Article34of the UNCITRAL Model Law on the 'Application for setting aside as exclusive recourse against arbitral award'.

this interpretation in the GNPOC case. *In Fisal Bank v. Osman Musa*[34], the High Court held that:

> *"The Nullity Suit is not a separate suit applicable to all rules in the Civil Procedure Code. This is because the purpose of the arbitral proceedings was set to reduce the time of adjudication and its domains."* [35]

In other words, the GNPOC case judgment was nullified under the provision of article 48 of the Arbitration Act 2005, making the Nullity Suit decision final, which would not be subject to any appeal or recourse process. With this decision, it became more apparent that arbitration practice and the interpretation of the courts were leaning towards support for the arbitral method.

The importance of globalisation is not only in the development of the international trade markets but, principally, in its transformation of institutions and contribute to a gradual erosion of the traditional concept of sovereignty.[36] It also develops trust for the investor, mainly if the laws consist of the transnational rules and the bases which organise the arbitration mechanisms regarding international commercial arbitration.[37]

Sudan witnessed remarkable progress in the economic field in the nineties due to investments made in various fields. The decrease in investments in the oil field was encountered by the increase of investments in industrial, real property and commercial areas after the new Insurance Act was issued in 2001 supporting arbitration as a method of settling disputes. The idea here is that since these units are all owned by the public sector under the same financial rule, then it would be best to settle disputes that arise among them by arbitration[38]. It may be described as a compulsory arbitration system for foreign investment disputes. Many laws were stipulated concerning this matter; the latest was Civil Procedure Code 1974. However, there occurred a decrease in voluntary arbitration.

---

[34] *Fisal Bank v. Osman* Musa 2007 C.R/86/-Revision/21/2008, Sudan Journal & Law Reports, (2008,(pp. 137–141.

[35] Ibid

[36] H. Alvarez, 'Arbitration under the North American Free Trade Agreement'. Kluwer Law International (2000) Arbitration International journal, vol. 16, No. 4

[37] Ahmed M. *Sheta 'The Arbitration an Explanatory and Comparative study of judicial provision & Arab and International Arbitration Institute'* (3rd edn, Daar AL Nahda Al-Arabiya, 2009) 300-305

[38] Khalil M. Ibrahim (n26) 302

Sudan joined the Convention on Settlement of Investment Disputes between States and Nations of Other States (ICSID) 1965 in 1973 and the Convention on the settlement of investment disputes of 1974. On a domestic level, new measures for arbitrations were needed especially with the advent of the twentieth century in order to cope with the modern world market mechanism to attract private foreign investment.[39]

The world has witnessed a revolution in foreign trade, and that may lead to the falling of the economic barriers between individuals and the emergence of arbitration as an effective means of settling disputes that may arise among the large commercial entities.[40] There was also the need for Sudan to adopt the UNCITRAL Model Law on Commercial Arbitration to suit the Sudanese position, and that is what the Sudanese legislature should rely upon.[41] However, the necessity to reform the arbitration bodies is also expected. Even though a great deal of these research considered the matters related to developing the practicing and arbitration law in Sudan, it supported the adoption of the UNCITRAL Model Law as an essential step to improve the arbitration system in Sudan and to encourage to ratify a significant number of international agreements and conventions relating to arbitration.

It would be a simple solution and would refer only to the arbitration regulations and consider the significance of the role of the institutions of arbitration in Sudan which are no less influential than the law that regulates the arbitration issues.[42] Currently, it has become evident that the regional states are showing intense competition against Sudan in attracting foreign investors and disputant parties' willingness to arbitrate their disputes. Thus, change had become overdue, and this is why the Arbitration Act, 2005 came into being.[43]

One of the weaknesses of the Arbitration Act 2005 was the lack of guidance to the courts to support the appointment of an arbitrator. Experience proves that the issue of arbitrator

[39] Kamil Idris (n4) 67

[40] H. Alvarez (n26) 123

[41] Mohammed A. Abu Zaid, 'Comparing article (1) of the UNCITRAL Model law, '*Scope of application*' with article 8 of the Arbitration Act 2005.' 'Arbitration Agreement'' (2006) Sudanese Judicial Judgments Journal , Vo.796 No.109

[42] Mohammed I. Khalil, (n20) 13

[43] The Chancellor Husain Awad Abualgasim drafted a proposal for a new Arbitration and Conciliation Act. Under the sponsorships of the National Assembly there was a committee formed by the Minister of Justice which unsuccessfully attempted to draft a new Arbitration Act in 2002. In 2004, another committee headed by Mawlana Dafaallah Al Haj Youssef, the ex-head of the Judiciary Department looked into the matter, but all these attempts failed to produce an arbitration law until 2005

appointment can be used to distract the arbitral proceedings. For example, in Alamin v. Abualarki,[44] the court of the first instance rejected the claimant's application for assistance with appointing the respondent's arbitrator. In its judgment, the judge held 'that the Arbitration Act 2005 did not provide or grant the Court the power to appoint the parties' arbitrators. Also, the Court is not a legislator to use its authority. However, the Appeal Court overruled this decision establishing that the Court had the power to appoint an arbitrator for the reluctant party. The Court noted that:

> *"according to the law, the requests of a procedure to apply to the first instance court ends by assisting the reluctant party to appoint an arbitrator, and does not intervene in the merit … "* [45]

In the judgment of the High Court in Nile Inter Trade Co. v. Atcoco Co.,[46] the court noted:

> *'Article 14 does not empower the court to appoint the reluctant party arbitrator, which considers an accurate interpretation violates the intention of the legislator. The role of the court is to interpret the law in a way that makes it useful, but the law embodies such authority'.*[47]

This judgment is supposed to be supportive of arbitration, and it provides confident guidance to the lower courts and practitioners in arbitration that the High Court will ensure that arbitration is supported as was done as in the Abualarki decision.

However, in January 2016, the High Court followed a new track. The Minister of Justice[48] revealed a new High Court decision in the Ministry of Finance v. Tractors Co[49] case, to support his draft project in the new Sudan Arbitration Act of 2016 in respect of the controversial Article 44 (discussed in more critical detail below). The Tractors Co decision states:

> *'Article 41(2) states that the jurisdictional court decision is final, this is an apparent violation to Article 35 of the Constitution that has given everybody*

[44] *Huda Abu Alaraki v. Abdalla Al-amin* Civil Appeal No. 2370/2006, (unpublished).
[45] Ibid
[46] *Nile Inter Trade v. Atcoco for Advanced Trading and Chemical Works Co*. Civil Recourse No. 310/2006, (unpublished) cited in Concluded Arbitral Principles (2008), Sudanese House for Books, p148
[47] Ibid
[48] Dr Awad Alnor, Minister of Justice The Finality or the Fees, S.C/892/2015, Khartoum, in AL-Sudani Newspaper, (28 February 2016)
[49] *Sudanese Tractor Co. LTD v. the Ministry of Finance and Planning* Constitution Court No. MA/TM/592/2015 (Sudanese, High Court 6 Mars 2015)

> *the right to litigate, and it is not allowed to prevent anyone to justice[50]. The constitutional provisions are an absolute and unconditional and neither discretion nor deception can be held against it by any legislative authority to forbid, limit or disable the right to litigation'.[51]*

The High Court expressed itself in powerful words, which effectively differs from the way it followed under the Arbitration Act 2005. The Minister of Justice referred to this decision in a newspaper article he wrote to defend his position after passing the controversial Arbitration Act of 2016.[52] The new Arbitration Act 2016 attempted to clarify some issues contained in the Arbitration Act 2005 for example the role of the courts towards arbitral proceedings, instead of the Minister of Justice, according to the Head of the Drafting Committee,[53] changed many of its provisions to affect the finality of the arbitral award[54]. It included an enormous range of interference by the court. This was by including provisions that require parties to deteriorate the appeal process under the provisions of the Civil Procedure Code 1983 as a standard lower court decision.[55] This was a stand of the Ministry of Justice to withdraw some of the advantages of arbitration because the country had been dragged into arbitration in various cases.[56] The judicial and legal system in Sudan is understandable because of the economic deterioration in Sudan since 2011.[57] The answer to this situation cannot be to undermine the rights of arbitration and the gains already made in this domain. The decision of the High Court in GNPOC v. Ramsees declared the status of the arbitral award, and this has been decision discussed above.

[50] The High Court understanding of justice is judicial supervision over the arbitral process. In this decision, the court disqualifies arbitration from being final and allow higher courts to consider as a standard lower courts decision.

[51] No. MA/TM/592 (2015)

[52] The High Court guided the arbitral proceedings in several cases discussed in this chapter it. These decisions clarified many misunderstandings about arbitration. Cases such as the Kassala State case and Fisal Bank cleared the track for arbitration to move forward.

[53] Dr Deraig Ibrahim, the Head of the Arbitration Act Review Committee. Interview on 28 May 2016

[54] Ibid

[55] Arbitration Act 2016 Article 44-6 Procedures for reviewing the nullity application. It means that the arbitral award can be counted as a lower court decision subject to the full view of the Appeal Court and the High Court following the Civil Procedure Code rules of appeal and recourse.

[56] In June 2017, the Ministry of Justice announced that 148 cases were registered at the Attorney General office against the state in six months. ALTYAR Newspaper, 10 June 2017.

[57] South Sudan announced independence in July 2011 after referendum following the Comprehensive Peace Agreement – signed in 2005 with Southerner's revolutionaries – Sudan People's Liberation Movement (SPLM), http://www.un.org/press/en/2005/sc8306.doc.htm. The South was supporting the Federal Government with oil which was considered 95% of exports of Sudan by the World Bank. See: http://www.worldbank.org/en/country/sudan/overview (29 July 2017). The loss of the oil made the Government of Sudan suffer a wide rangeof shortages which reflected themselves in arbitration claims against the Government.

From the above discussion, it is clear that the Arbitration Act of 2005 was influenced by the surrounding circumstances, particularly to stimulate domestic and foreign trade and investment in the country.[58] In light of this legislative development, the Sudanese judiciary was trying to establish the principles that helped in deepening the role of arbitration under the laws existing at that time. Some of these policies were published before the new Act was issued.[59] For example, the principles of the Arbitration Act 2005 permitting arbitration outside of Sudan, subject to the requirement that the agreement of parties residing abroad and granting awards from elsewhere would be acceptable if this does not affect the public policy of Sudan.[60] Another example concerns the non-requirement of the arbitrators to follow the provisions of the convention in all circumstances. The court has no right to nullify an award already issued, as this has nothing to do with the public policy.[61.] In 2013, in Kassala State v. Sala International[62], the High Court held that the court must commit the parties to arbitration unless they both overlook the arbitration agreement and proceed with the litigation. This case closed any debate about the validity of the arbitration agreement. It made it clear to practitioners that the court will not use any discretion in the face of an arbitration agreement, according to Article 10 of the Arbitration Act 2005.

The Government of Sudan was the applicant before the Constitutional Court in the case of *Almatanog*, and *South Kordofan.*[63] Also, in the Tractors Co case, the Government of Sudan was the defendant. In addition to these, a temporary Presidential decree passed a new Arbitration Act 2016 but the Legislative Committee[64] of the General Assembly declined the Act. However, the Minister waited for the General Assembly was at holiday time and released it, but he proceeded under the Presidential Decree.[65] The new temporary decree created suspicion between the lawyer community and the Ministry of Justice. As a result, the

[58] Chancellor Ibrahim Draig, in the seminar held in Khartoum in November 2005, 'In the light of new Arbitration Law', 2005.
[59] Chancellor Hussein A. Abualgasim; the member of the legislation Committee for drafting the Arbitration Act 2005, 'Circumstances around the Enactment of new Arbitration Law', (2006) Sudanese Judicial Judgments Journal, Vo.789 No 109.
[60] See the Arbitration Act 2005 articles 4 and 41 (A) .
[61.] Magdi Elsaliabi, 'The New Arbitration Act 2015 and the Necessity to Pass it Under a Temporary Decree', Alintabah Newspaper, 16 February 2016.
[62] *Kassala State v Sala International* C.R/232/2011 - R/94/2012, Sudan Journal & Law Reports,(2013), p279–287.
[63] *Almagmou'a Almutakamela (Integrated Group) v Borahn and others,* (1999) Civil Recourse No. 624/1999, Sudan Law Journal & Reports, 192.
[64] This measure was taken for the first time in the process of enacting Sudanese laws.
[65] Dr Awad Alnor, 'The Finality or the Fees', Alintabah Newspaper, 28 February 2016.

bar made a public announcement to criticise the behaviour of the Minister and the law.[66] They all agreed to revoke the temporary decree at the next assembly session which took place. This new policy treats arbitration as one of the levels of the litigation process[67] is an indication of the government's intention to limit the finality of the arbitral award.[68] This intention of the government was expected as the government used multiple litigation levels but followed the Civil Procedure Code rules at many levels of litigation.[69] Such a procedure has increased dispute resolution over many years.[70] In arbitration, government bodies and companies who are parties to the dispute may not have any protection.

In December 2016, the Constitutional Court rendered the decision in the Tractors Co case.[71] All arbitration practitioners were eagerly waiting to read the Constitutional Courts' opinion on the Supreme Court decision. The decision is viewed as being an achievement for arbitration and annulled the High Court decision as expected. In its judgment, the Constitutional Court held that:

> *"…Only the Constitutional Court has the competence on the constitutionality or non – the constitutionality of a legal text. The Constitutional Court issued more than a judgement in the constitutionality of art: 41/2 of the Arbitration Act…"* [72]

The wording used by the Constitutional Court was straightforward and clear to the degree that the judgment only referred to the constitutional criteria[73]. It is worth mentioning here that Sudan did not have substantial case law on international arbitrations that could provide for grounds on how to draft a modern law on arbitration. Furthermore, the new law had to repeal the existing provisions of the Arbitration Act 2005, especially to the effect that an arbitration commitment gives rise to an obligation to arbitrate.

---

[66] In October 2017, a group of jurists and academics filed an appeal to the Constitutional Court against the Presidential Order; on grounds that the Arbitration Act 2016 was passed without the approval of the National Assembly, which violates the Constitution Article 9

[67] Ahmed Bannaga, answer to the Minister of Justice, Alahram Newspaper, 23 February 2016.

[68] It can be seen that the Civil Procedure Code 1983 empowers the State to seek several expansions of the appeal process, which are both not applicable under the Arbitration Act 2005. These fair and fast proceedings of arbitration were not set in the government character, which makes the finality of the award and the restricted appeal process not welcomed by the country.

[69] The Civil Procedure Code's articles gives the government grace periods at many levels, for example: before the suit in Article 33-4 (two months) and the execution process Article 213 (four months).

[70] Under the Civil Procedure Code, an appeal can takes up to four levels from the Appeal Court to the Constitutional Court.

[71] Constitutional Recourse 104/2016 dated 22 November 2016

[72] Court (2015) No. MA/TM/592(n19)

[73] Kamil Idris (4) 222

The committee that drafted the Sudanese Arbitration Act 2005 drew on the arbitration laws of some other countries; notably, the Egyptian Arbitration Law No 27 Act 1994, the Jordanian Law Act 2001, Saudi Arbitration System No. 46 /1404, and the arbitration rules of the UNCITRAL Model Law on Arbitration of 1985.[74] In the context of the Egyptian Law, for example, Chapter III, Articles 21 and 22 of the Sudanese Arbitration Act use the same wording when regulating the recognition procedure set out in the arbitration agreement conducted. Furthermore, arbitration proceeding commenced as did the Egyptian Act in Part IV- the Conduct of the Arbitration Proceedings.

However, the Sudanese Arbitration Act 2005 is relatively modern and straightforward to understand; it took a while for arbitration to become sustainable. However, the situation after the Arbitration Act 2005 was moving from the weak support of the courts in the GNPOC case to the broad support by the Constitutional Court in the Tractors case. Even though the Tractors Co case was a victory for arbitration in Sudan, the Arbitration Act 2016 was enacted and created another debate about many issues, particularly, the finality of the award which is reviewed below.

3.4 The Impact of Arbitration Act 2016 on the Sudanese Arbitration System

Following the practical application of arbitration under the Arbitration Act 2005 by the Judiciary, lawyers and the Ministry of Justice, many challenges and weaknesses were identified by stakeholders and practitioners. A new arbitration law was issued in 2016, by an interim order of the (previous) President of the Republic of Sudan based on Article 107 of the Constitution of 2005. However, the Arbitration Act 2016 did not for the most part differ from the Arbitration Act 2005 in form and content. The legislature has formed five articles for the Arbitration Act 2016, namely Articles 16, 29, 32, 44 and 50. It has passed all the articles stipulated in the Arbitration Act 2005 without any distortion or change. Article 16 was developed by the legislature, which specified the circumstances of removal of the arbitrator. However, article 16 of the Arbitration Act of 2016 did not require that "an arbitrator (is) prohibited from disclosing his opinions or information related to the dispute". The duties of

[74] See Egyptian Arbitration law No./27/ 1994 Sections 7(1)(a), 9, 16(2)(a)(b)(c), 43, and 47(1)(a)(b)(c). See Jordanian Arbitration Act 2001 Sections 9, 11, 27 and 34. See also, Saudi Arbitration system No. /46 /1404 Sections 2, 21 , 26 , 29, 45, and the UNCITRAL Model Law on Arbitration of 1985 Sections 3 (a)(b) and 31

an arbitrator may be divided into three categories. Article 29 was established by the legislature, which allowed the arbitral tribunal to seek the assistance of experts. Article 32 provides for arbitral tribunals to have the inherent power to recommend that the parties settle or resolve the dispute on a friendly basis, usually through their counsel, during the proceedings.

The new law has given rise to several issues in the Sudanese arbitration system. Article 44 of the Arbitration Act 2016 did empower the appeal courts in Sudan to consider the invalidity of an award. Article 50 increases the power of the Minister of Justice to allow, investigate and exclude arbitration centres, retroactively. Thus, all registered arbitration centres functioning in Sudan have to adjust to any new rules that the Minister may adopt . Nevertheless, the new arbitration law is deemed a real setback for arbitration in Sudan.[75] Consequently, a group of jurists intervened to oppose this Temporary presidential Decree [76] indeed, many workshops and seminars have been held to comment on the defects and weakness of this law and have demanded amendments to it or to repeal the Act.

In addition, an appeal was filed and submitted to the Constitutional Court against the effect of the Presidential Interim Order on the grounds of its being an unconstitutional order, because it violated the provisions of Article 197 of the Constitution. It was not necessary to issue the Republican Interim Order for the implementation of the arbitration law as it was possible to present this law to the National Assembly to be deliberated and discussed like all other legislation.

However, the need for the current Arbitration Act 2016 for Sudan can hardly be overemphasised when the country is at the threshold of a new phase of socio-economic development[77]. Some private foreign investors (commonly known as transnational corporations) are expected to make investments in the country, and the current commercial

[75] A variety of workshops and seminars have been held in Khartoum on the provisions of the Arbitration Act 2016. However, most of the arbitration experts and academic scholars in Sudan unanimously agreed that the Arbitration Act of 2016 was litttle different from the 2005 law, which had many shortcomings in form and formulation, since it did not provide any clear positive addition to arbitration system in Sudan.

[76] In October 2017, a group of jurists and academics filed an appeal to the Constitutional Court, against the Presidential Order; on the grounds that the Arbitration Act 2016 was passed without the approval of the National Assembly which thereby violated the Constitution Article 9.

[77] M. Taha, Abosamra (n5) 121

practice suggests that in the event of any dispute arising under a contract, the parties concerned prefer to refer it to arbitral tribunals rather than the courts.[78]

It is therefore essential to ensure that the Arbitration Act proves to be attractive to private foreign investors.[79] Otherwise, they might opt for delocalisation of a dispute in violation of one of the fundamental principles of the law concerning the contract, which suggests that the place of performance of a contract provides not only the governing law of it but also the jurisdiction to settle disputes that may arise under it. To develop an attractive arbitration system, an Arbitration Act should provide the following:[80]

(a) A linkage between arbitral tribunals and the local judiciary. This is because, in the final analysis, an arbitration procedure is primarily a private method of settling disputes between the parties to contracts, a judiciary, being a public institution, is supposed to be neutral to the parties to an arbitral dispute.[81]

(b) Thus, where an arbitral tribunal may sacrifice its neutrality by showing bias, whether actual or not, the matter should be referred to the local judiciary for a settlement[82]. The judicial system of a country should be endowed with the power to supervise arbitral tribunals

(c) That in the event of a party to an arbitral proceeding questioning the jurisdiction of the Tribunal, the matter would be referred to the national judiciary for a settlement of that dispute.[83]

(d) Again, in the event of a party to an arbitral proceeding questioning the eligibility of an arbitrator for settling the dispute under consideration, the matter should be settled by the local judiciary.

(e) By the same token, if a party to an arbitral proceeding brings an allegation to the effect that the tribunal concerned has not followed the appropriate procedure for conducting the proceedings;[84] the issue should be referred to the local judiciary for a settlement.

---

[78] Hafiza Al Saied. *The Signed Contract between Countries and Foreign Persons*, (1st edn, Dar Al Nahda Al-Masrya, 1996) 265

[79] Mustill and Boyd, '*Commercial Arbitration*'. (2nd edn, LNUK, London, 1989) 198

[80] Ibid 200

[81] G. Born, '*International Commercial Arbitration*'. (2nd Edn, Kluwer International Law, 2014) 424

[82] Magdi Elsaliabi (n77)

[83] Ali Ibrahim AL-Emam, 'Drafting and Naming of Provisions' Ministry of Justice (2002) The Journal of Judicial Judgments. (2002) Khartoum, Vo.177, No.225

[84] Ibid

These are some of the issues which foreign arbitral parties would look for in arbitration legislation. Private foreign investors would also look for the panel of arbitrators maintained by the local arbitration centre or the chamber of commerce. It is in light of the points mentioned above that the effectiveness of the current Sudanese Arbitration Act, 2016 should be examined.

3.5 A Critical Examination of the Contents of the Chapters in the current Act

Chapter I - The title of this chapter is; Repeal; Application of the Act; Interpretation; Local Jurisdiction; Plea of non -jurisdiction; International Arbitration; Arbitration Agreements; Plea of Arbitration Condition; Agreement on Arbitration during Court proceedings: and Interlocutory procedures.

The order of the subheadings in this Chapter is rather unusual. The sub-headings such as "Repeal, Interpretation" are usually incorporated into the latter part of an Act. The themes of the subheading "Local Jurisdiction" are twofold: (a) jurisdictional issues are to be decided by the local courts: and (b) in the event of "delocalisation" of arbitral proceedings, the jurisdiction shall be determined by a general court. Usually, in arbitration proceedings, jurisdictional controversies are considered by the tribunal concerned; the aggrieved party will then have the right to appeal to the local judicial authorities[85]. Secondly, whether an arbitral proceeding should be delocalised or not is a matter for the parties concerned, not of a judicial authority.[86] This may discourage private foreign investors from entering the country.

However, Article 3(1) of the Arbitration Act 2016 may be considered to be an excellent addition to the Sudanese arbitration system. It defines the scope of the application of arbitration law to domestic and transnational arbitrations. It keeps the option open to parties to choose the provisions of the Arbitration Act 2016 in order to settle the dispute between themselves.[87] This concept is adopted by most of the arbitration laws in the Arab countries and is consistent with the text of Article 28 of the UNCITRAL Model Law 1985.

[85] Alan and Martin Hunter, *Law, and Practice of International Commercial Arbitration*, (Sweet & Maxwell, 1991) 256

[86] Mahmoud Hashim, *The General Theory of Arbitration*. (Dar al-Fikir, 2011) 292

[87] Sarah Saif Al-Islam Abbas, *Revocation and analysis Arbitration Act 2016*, (J.A, Khartoum, 2017) No.2 , 83

The potential extra-territorial application of the Arbitration Act to proceedings to be conducted abroad if the parties have agreed to such application; the arbitral tribunal will impartially and judicially determine the parties' rights and must do so in compliance with the principles of due process, natural justice, and common law. These principles are embodied in statutory provisions as well.[88] The arbitral tribunal is required to determine the dispute by the application of the law and principles permitted or recognised by law.[89]

The Arbitration Act does not explicitly lead to the resolution of an arbitration agreement through electronic means, but does not expressly exclude such a possibility, which remains to be governed by the applicable Sudanese laws;[90] under the Arbitration Act 2016, the arbitrators do not have jurisdiction to establish interim assistance unless the parties' agreement gives such power. However, the new Arbitration Act adopts additional measures for determining the transnationality of the arbitration[91].

An arbitration clause has been defined in Article 4 in the following way:

> " *Arbitration clause ", means the agreement of parties to disputes having civil nature, to refer any dispute, as may arise between them, concerning the execution of the specific contract, or to refer any dispute as may be between them, to be resolved through tribunals, or individuals, to be selected by their wills and agreement. "*[92]

Rather than forcing on the parties the way in which their dispute should be settled, the Article, based on the principle of party autonomy allows parties to determine how they govern their contractual relationship and refer their dispute to an arbitrator when the parties have made an appointment.

The autonomy of the parties is part of a broader power in international transactions to select not only the law but also the forum which will determine the disputes arising out of their contractual relationship.[93] Since the Arbitration Act, 2016 is based on party autonomy, and an arbitration agreement is a clause usually attached to a commercial contract of some sort,

---

[88] This refers to substantive as opposed to procedural law: see, e.g., *Tehno-Impex v Gebr Vett Wilson and Green Van Weelde- Scheepvar Kantoor BV* [1981} QB 648, (1981) 2 All ER 669, CA (Eng).

[89] *Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd. Malaysia*; (2001) 6 MlJ 727

[90] Personal interview with the Head of Faculty of Law, University of Al-Nileen, Professor Ahmed Hammo, Khartoum, April 2017.

[91] Muawiya O. Al - Haddad, The Intervention of the Sudanese Judiciary in Arbitration Assistance and Supervision, Khartoum, Dar El-Nahir press (2017)117

[92] Arbitration Act 2016, art 4

[93] Ahmed Hammo (n52)

considerations of freedom of contract in Sudanese Arbitration law, which was established in chapter 1 of the Act. Arbitration is primarily a private dispute settlement system based on the principle of consensus.

Regarding the issue of domestic arbitrations, the new Act failed to amend Article 5 of the Arbitration Act 2005 but left the situation undefined in terms of when arbitration should be called transnational.

Article 5 of the Arbitration Act 2016 provides that:

> "*…subject to the provisions, set out in Chapter II, of Part I, of the Civil Procedure Act, 1983, jurisdiction to consider arbitration matters shall be to the competent court, in accordance with the provisions of this Act. As for where the arbitration is outside of Sudan, the jurisdiction shall be to the General Court, in Khartoum, unless the parties agree to the jurisdiction, being vested in another court in Sudan…*"[94]

In the light of the above Article, the jurisdiction of the arbitration issues shall be considered by the General Court in Khartoum, as set out chapter II, part I in the Civil Procedure Code of 1983. This Article grants the parties the right to choose ‘'another" court in Sudan, but this "other" court has not been specified in the legislation[95]. Whether it is the public court or another competent court, it seems clear that this Article highlights the importance of jurisdiction in transnational arbitration issues handled by the public court, because it is the most competent court for adapting to transnational arbitrations[96].

The law grants special jurisdiction to the court to consider arbitration. However; the law did not justify the reason for this procedural discrimination. Article 7 Arbitration Act 2016 provides that:

> " *In accordance with the provisions of this Act, the arbitration shall be international in the following cases:-*
> *A- Where the headquarters of the business of the arbitration party's business is in two different states:*
> *B- Where the subject of dispute, included in the arbitration agreement is connected to more than one state*"[97]

[94] Arbitration Act 2005, art 5
[95] Muawiya O. Al - Haddad (n91)
[96] Khalil M. Ibrahim (n26)
[97] Arbitration Act 2005, art 7

Domestic arbitration is that kind of arbitration where all its elements are related to one state, namely, the subject matter of the dispute, the nationality of the parties and arbitrators, the applicable law and the seat of the arbitration.[98] The national law is applied without any problems concerning the applicable law of arbitration, as is the case with foreign arbitrations. Commentators have differed as to the definition of transnational arbitrations and international arbitrations. Some described them as synonymous with their elements. In this respect *Foushard* says;

> *"Others differentiate between international arbitration and foreign arbitration, arbitration is considered international if the parties agreed on relationship affiliated to international trade relations, and of no importance is the nationality of the parties or the seat of arbitration or the applicable law."*[99]

Arbitration becomes foreign if the seat of arbitration is in a state other than the state in which the award is to be enforced.[100] Consequently, the appeal to a foreign arbitral award will be in the form of the request to terminate the enforcement or claim against the parties requesting enforcement. The national judge has the right to refuse to issue an order for its enforcement, according to the New York Convention 1958,[101] if the awards have been rendered by a competent authority in the state that issued the arbitral award. However, on the other hand, if arbitration is transnational, it is possible to appeal the arbitral award in Sudan and consider its invalidity under the Sudanese Arbitration Act 2016. The New York Convention (and the other international arbitration conventions) applies only to arbitration agreements that have some "foreign" or "international" elements, and not purely domestic elements. Fundamental criteria are: the place of an arbitral award, the arbitrators' nationality or the nationality of the litigants, or the headquarters where the seat is located of the arbitral tribunal or the competent court to deal with the dispute.[102]

The Arbitration Act 2016 provides in Article 7 that arbitration is 'international' within the scope of this article if the matter thereof relates to international trade. In defining 'trade' in the Arbitration Act, the law has followed the modern standard, which is the standard of the economic nature of the seat of arbitration. The law added to this the necessity of the

[98] Fouchard, E. Gaillard et B. Goldman, *'Raité de l'arbitrage' Commercial Arbitration.* (LexisNexis, 1997) 49-50
[99] Ibid
[100] Abu Zeid Rudwan, *The General Bases of International Commercial Arbitration* (2nd edn, Daar Al-Nahda Al-Masria, 2006) 144
[101] Article V(1)(e) of the New York Convention 1958
[102] Sundra Rajoo, (n56) 618

availability of one of the conditions,[103] which is provided for in Article 7 of this law, which established the following principles that if the head office of the parties to arbitration is situated in two different countries and those parties have concluded several agreements. If either of the two parties has several business centres, it is the one most closely linked to the subject matter of an arbitration agreement that shall count. In the event of none of the parties having a business centre, and then the usual place of the residence of the parties shall be counted.[104] The following are also the case.

(a) If the parties to the arbitration agree to choose a permanent arbitration organisation or an arbitration centre having headquarters in Sudan or abroad for example: to refer the dispute to Cairo Regional and International Commercial Centre for Arbitration[105], or the International Chamber of Commerce in Paris;[106]

(b) If the subject within the dispute included in the arbitration agreement is connected to more than one state, and then the dispute is related to transnational trade, that is, it is arising from a relationship beyond the geographical borders of one state.

(c) If the head offices of the parties to the arbitration are located in the same state at the time of concluding their arbitration agreement, and one of the following places is situated outside that country:

    (i) The place was chosen as the seat of arbitration in the arbitration agreement;[107] or

    (ii) the place in which an essential part of the obligation arising from the commercial relationship between the parties is performed; or

    (iii) the place closely linked to the subject matter of dispute, and this is a relative matter varies from one case to another.[108]

---

[103] Chancellor Hussein A. Abualgasim; the member of the Legislation Committee of Drafting the Arbitration Act 2005. 'Circumstances around the enactment of new Arbitration Law', (2006) published by Sudanese Judicial Judgments Journal, Vo.789 No 109

[104] Kamil Idries (n4) 27 cited this idea which is derived from the United Nations Convention on the International Sale of Goods - Vienna 1980, which relied on the Business Centre for the parties to the sale and it is in the process of determining the international status in the first article, which stipulates that "if the parties to the arbitration do not own a business centre, the usual place of residence is put into consideration. In this case a comparison is made between this counter status of the other party or place of the habitual residence and the business centre of the other party or his usual place of residence as to its location in the same country or not."

[105] Article 1 'Scope of application' of the Cairo Regional and International Commercial Centre for Arbitration Grants the same right to the parties to arbitration agreement.

[106] See also article 2(3) UNCITRAL Model Law

[107] Ahmed M Sheta, (n61) 96-97

[108] Ahmed Eltijani Eljaali (n25) 17

The law has taken such instances from the Model Law without any changes and has added general standards of internationality.[109] Also, it was added to the second paragraph that if the parties preferred to refer it to one of the centres or permanent organisations of arbitration, then arbitration could be had in a foreign state.

Controversies arose concerning Article 7 of the Act, and it should be noted that this Article caused much confusion concerning the definition of international arbitration. Thus, it is essential here to comment on this article: First; the general standards of international arbitrations set by the legislator which is concerned with the necessity of the subject matter of dispute to be related to foreign trade or not, seem to be entirely correct,[110] as it had restricted the scope of transnational arbitration of disputes to transnational trade only whereas the new law refers to arbitration in civil and commercial matters equally.[111] This means that, according to these criteria, any relationship that arises from contracts of sale or rental of property, subject to the definition of international trade provided for in the above article, for example, in two different states and there was an arbitral agreement between the parties in these states. This arbitration is not transnational since the contract is not related to transnational trade[112].

In Article 7, "Internationality" would not necessarily encompass commercial arbitration, and then it would have been better to mention the word "commercial" at the beginning of this Article. That is what the Model Law has done where it provides for the dispute is of an "international", nature. Perhaps the Sudanese legislators should not have set any general standards for the meaning of "international" and should have been content with the cases mentioned in the text of this article, or to set general standards for transnational commercial arbitration without citing the cases as the French legislation did[113]. If it is necessary to set any standards, it would have been better to include the phrase "if the subject matter of the dispute has a foreign element" instead of stating that: "if the matter thereof is related to International trade".

---

[109] ibd

[110] Azhary A. Sharshab, *Authenticity of the foreign judgment and its Enforcement Methods.* (2nd edn, Khartoum, AL Daar AL Sudaniya, 2013) 119

[111] Mohammed A.Abu Zaid (n31) 198: Ibrahim M. Draig (n21) 64

[112] Azhary A. Sharshab (n110) 21

[113] Mohammed A. Al Mmokhlafi*, Importance and Role of international Commercial Arbitration,* (2nd edn, Secretariat General of the Arab Association for International Commercial Arbitration, Journal of Arabic Arbitration, Trend of Progress 2000)

If the leading centres for the businesses of the parties are located in one state, the arbitration will not be declared as transnational under Article 7. Moreover, it cannot be a transnational arbitration under the operation of this Article if the parties' work is located in a single State, regardless of the size of its business. Thus, the wording of the Article is not precise. Also, the Article lacks a vital concept; it does not deal with the issue of international trade.[114]

There is another issue, which has not been addressed by the legislator: what if one of the parties has more than one business centre? Example: Mr A has a work centre in Sudan, and another work centre in Kenya, and Mr B, who is a resident in Kenya, owns a work centre in Sudan. Mr A contracted at his work centre in Kenya with Mr B to establish a cement factory in Kenya, and the contract incorporated an arbitration clause.

Also, assume that the work of Mr A in Kenya is more closely related to the arbitration agreement than his work centre, which is in Sudan. The standard of 'international' arbitration will be the most closely connected centre and that location of the subject matter of the arbitration agreement. Article 7 did not make evident with a situation where no one of the arbitration parties has a business centre: however, in the absence of any provision, it is not usual place of the ordinary residence of the party.

Based on the previous example, if the business centre of A was not in Sudan or Kenya, and his ordinary residence location was in Kenya, one may assume that the dispute is a dispute of a transnational centre, even if the nationality of A is a Sudanese and B's nationality is Kenyan. Where the parties may be of the same nationality and it still amounts to transnational arbitration, or alternately the parties may be of different nationalities, and the arbitration is not international.

Furthermore, Article 7 points to the subject matter of the dispute by more than a state: where the law did not leave the international recipe submitted to the consent of the parties.[115] However, the main weak point of the text is that it did not link this external reference to international trade, i.e. the connection of the dispute to more than the state concerned as a

[114] The law applicable to the Arbitration Agreement and the arbitration shall be the law applicable at the seat of the arbitration, unless and to the extent that the parties have agreed in writing on the application of other laws or rules of law and such agreement is not prohibited by the law applicable at the arbitral seat.

[115] Kamil Idris (n63) 33

result of international trade and the movement of goods, services, and money across the geographical boundaries of countries[116].

Secondly: the need for the distinction between domestic arbitrations and transnational arbitration seems to be extremely important, and, hence, the need to set a strict standard to the distinction between them as otherwise[117], it would lead to the following consequences:

(a) as to the law applicable to the subject matter of the dispute and its procedures, the legislators have provided in Article 3 (i) of the Arbitration Act, 2016 that Sudanese law would be the applicable law[118] to all arbitration conducted in Sudan or any transnational commercial arbitrations conducted abroad if the parties agree to subject it to the provisions of this Act.

(b) It falls on the court having original jurisdiction over a dispute involving domestic arbitration.[119] If. however, there is a claim of nullity; the claim shall be lodged with the competent court for the dispute, which in the case of transnational arbitration lies with the Court of Appeal in Sudan unless the parties to the arbitration agree to the competence of another court.[120]

Several jurisdictions have different sets of rules for transnational arbitration: Belgium, Egypt, France, Hong Kong, India, and the UK. In these jurisdictions, domestic arbitration agreements, arbitral proceedings and awards are often subject to separate, non-international legal regimes.[121] This is consistent with the purposes of the New York Convention 1958 and the UNICTRAL Model Law, which is to facilitate the international arbitral process, without the burdensome regulations of domestic arbitration systems.[122]

There are many different national legal systems or rules of law that might have a different definition for transnational arbitrations: (i) the law that governs the capacity of the parties to

---

[116] Chancellor Hussein A. Abualgasim (n103)

[117] T. Cole. 'Legal Instruments and Practice of Arbitration in the EU' , (European Union, 2 Feb 2015) , Brussels http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509988/IPOL_STU(2015)509988_EN.pd accessed 15 May 2017

[118] Ahmed Eltijani Eljaali (n17) 44

[119] Ibid

[120] Arbitration Act 2016, art 42 (2)

[121] A.El-Ahdab, *Arbitration with the Arab Countries*, (3rd edn, Kluwer Law International, 2011) 332

[122] Albert Jan van den Berg, 'When Is an Arbitral Award Nondomestic under the New York Convention of 1958?' 6 Pace L. Rev. 25 (1985)
Available at: https://digitalcommons.pace.edu/plr/vol6/iss1/2 Accessed 10 May 2017

enter into an arbitration agreement (ii) the law that governs the agreement to arbitrate, [123] and (iii) the law that will govern the recognition and enforcement of a foreign arbitral award.

In the case of the *Republic of Ecuador v. Chevron Texaco,* the court tried to apply the law of form where enforcement is sought[124:]

> *"The law applicable to the parties' arbitration agreement may be different from both the law applicable to the substance of the parties' underlying contract and the arbitral proceedings. The law governing an international arbitration agreement is usually regarded as applicable to Formation, Validity, Effect, and Interpretation"*[125]

However, this distinction should be removed, and there should be only one law for "arbitration" in Sudan, whether domestic or transnational.[126] It should also be noted that the parties can agree (under the Model Law or other domestic legislation) on whether arbitration should be treated as being transnational or domestic. Simple adoption of the rules under the heading of "transnational" or "domestic" will not be sufficient to effect such an agreement.[127]

On the other hand, if arbitration is transnationally conducted abroad, and the parties agree to subject it to the National law, the judge may use his authority as to the validity and the enforcement of that award.[128] The second point is that if the arbitration is transnational, but the parties did not agree to subject it to national law, here only the judge is committed to executing the provisions of the international conventions, notably the New York Convention. Judicial authorities may restrict the jurisdictions of the related court because its role is mainly to examine the admissibility of enforcing the award or not.[129]

Article 9 of the Arbitration Act 2016 under the title of "Plea of Arbitration Condition" stipulates that:

> *'The Court to which a dispute has been referred, with respect of which an arbitration agreement has been reached, shall dismiss the suit where the defendant……pleads the same, otherwise he shall be deemed as relinquishing his right to plea the arbitration condition"*[130]

---

[123] Ibid page 354

[124:] *The Republic of Ecuador v. ChevronTexaco Corp* {2006} 426 F. Supp. 2d 159 S.D.N.Y.2006 (hereinafter ROE II)

[125] Ibid 203

[126] Ibrahim M. Draig, (n21) 66. See also New York 1958 Convention article 1

[127] *Sol International Ltd v Guangzhou Dong-Jun Real Estate Investment Co Ltd* [1988] 3 HKC 493

[128] Ahmed Sharaaf Elddin, 'Domestic Arbitration and International Arbitration and the difference between them' Seminar held in Cairo on 12/13 September 1994, organised by the Cairo Regional Centre for International Commercial Arbitration of Provisions of the Arbitration Law.

[129] [1988] 3 HKC 493 (n110)

[130] Arbitration Act 2016, art 9

The plea of the lack of jurisdiction is a matter of procedure. It is for the respondent to enter this plea in its defence. The subheading entitled "Plea of Arbitration Condition" seems to be slightly unclear and perhaps redundant.[131] Also, in the text above, the Act did not specify what is meant by the phrase or '*before the response of the suit pleas*'. The legislator has to be precise in determining the specific time of convening the jurisdiction of an arbitral tribunal to settle the dispute under the arbitration agreement[132], which is referred to in the original contract and determines the time to submit the defence on the grounds of the lack of jurisdiction '*before responding to the claim.*'

This Article is embroiled with a delicate issue, and the text of it supports the participation of the courts in supervising arbitral proceedings from the beginning on the one hand; and on the other, it undermines the process of arbitration as a means of settling disputes between the parties. The real relationship between the jurisdiction of the court and the arbitration mechanism itself provokes contrary.[133]

The line between arbitration and litigation needs to be improved. Arbitration proceedings should be excluded from the supervision of the laws.[134] However, by challenging an arbitration agreement in the court; a party may effectively weaken the arbitration agreement and make a situation of inefficient court proceedings. This may lead to contradictory resolutions of the dispute as this would lead to additional costs and delays and undermines the predictability of dispute resolution as well as creating incentives for abusive litigation tactics.[135]

Where the arbitration clause is valid, the court must render an award in cases in which it is clear that the dispute should be referred to a tribunal. Then the dispute would be referred to an arbitration tribunal according to the agreement.[136] The court would always try to give effect to the terms of the arbitration agreement even though the contracting parties had failed to act

[131] A. Hammo (n52)

[132] Kamil Idris (4)

[133] Ahmed El. Eljaali (n71) 49

[134] Proposal For A Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Com/2010/0748 Final - Cod 2010/0383 */ at http://eur-lex.europa.eu/legal content/ accessed 10 January 2018

[135] *S. Rajan v State of Kerala*, (1992) 3 SCC 608. See also *Rite Approach Group Ltd. v. Rosoboronexport*, (2006) 1 SCC 206 and *Iron & Steel Co. Ltd. v. Tiwari Road Lines*, (2007) 5 SCC 703.

[136] *G. Ramachandra Reddy and Co. v. Chief Engineer* (1994) AIR 1994 SC 2381

according to the contract. Initially, the objective to follow is the relation between the arbitration agreement and the court proceedings.[137]

It is necessary to maintain a balance between the independence of the arbitration mechanism and the intervention of the judiciary. The challenge here is to understand the extent of this relationship between the two institutions. The English judiciary has broad supervisory authority over arbitrations under the Arbitrations Act of 1996.[138]

The parties are free to agree on how to deal with the situation in which each party is to appoint an arbitrator, and one-party refuses to do so or fails to do so within the time specified in Article 9, rather than to dismiss the procedure at the first sitting.[139] *Redfern and Hunter* [140]cited Article 19(1) of the UNCITRAL Model Law (Model Law), which provides that:

> *"Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings."* [141]

The party autonomy rule is the guiding principle in determining the procedure to be followed in international commercial arbitrations. It is a principle that has been permitted not only in national laws but also by international arbitral institutions and organisations.**[142]**

On the one hand, if the parties have not made such an agreement, this article assumes that one of the parties, having appointed his arbitrator, may give notice in writing to the other party in avoidance that he proposes to appoint his arbitrator. If the other party fails to appoint his/her arbitrator (s), then the court requires the party in default to make the necessary appointment and notify the other party that he has done so, within one clear month of the notice received by him. If he fails to do so, the other party may appoint his arbitrator, whose award shall be binding on both parties.

---

[137] Ibid 109

[138] Charles Manzoni (n75)

[139] Julian D. M. Lew, *Applicable Law in International Commercial Arbitration*: A Study in Commercial Arbitration Awards (2nd edn, Oceana Publications, 1978) 98

[140] Redfern and Hunter, with Blackaby and Partasides, *Law and Practice of International Commercial Arbitratio*n (4th edn, Kluwer Law International, 2004) 315

[141] The UNCITRAL Model Law 1965 article 19(1)

[142] Redfern and Hunter (n91) 316

The courts have authority to extend a one-month time limit, where an arbitrator has been appointed, and the party in default may, upon notice to the appointing party, apply to the court to set aside the order of appointment.[143] The Sudan Arbitration Act 2016 does not recommend any grounds on which the court might do so. Therefore, the court seems to have the discretion as to whether to dismiss the procedure or to set aside the appointment of arbitrators[144]. Moreover, the provision of Article 9 may encourage many people to use this text as a pretext to evade lawsuits and arbitration, where the court makes an appointment under Article 9 of the Act, which has the same effect where the parties agree to arbitration.

The Court of Appeal in *Huda Ahmed Abu Arki v. Abdullah Mohammed Amin*[145] ruled that a competent court can compel the party that refuses to appoint an arbitrator from his side; otherwise, the court shall appoint an arbitrator despite the failure of a party to do so.

Article 11 (1) of the Arbitration Act 2016 provides

> *"Any party may request the competent court, before the formation of the tribunal, or the Arbitration Tribunal after the formation to take interlocutory procedure. ".*[146]

This Article keeps up with contemporary legislation to give the courts a dual role: control and power of order which a private mechanism of arbitration does not usually enjoy. It is a critical issue in an argument on the invalidity of the arbitration agreement, and it is one of the situations that often arise at the end of an arbitration proceedings.[147] Here, the qualifications and eligibility of the parties are examined, which means determining whether they have that competence in the disputed issues to consider the arbitration agreement.[148] Those who fall under guardianship, for example, may not be allowed to conclude an arbitration agreement. This privilege is allowed to the protector or the guardian[149]. So, if the protector or the guardian concluded an arbitration agreement, according to the requirement of the law, then it is valid.

---

[143] Ibid 219-226

[144] Mohammed A. Farah, *The Necessary Substantive rules for an Arbitral Award*, (Khartoum University Press, 2017) 148

[145] *Huda Ahmed Abu Arki v Abdullah Mohammed Amin* (2014),N0/MA/TM/645/

[146] Arbitration Act 2016 Art 11 (1)

[147] Mahmoud A. Omar Althioi, *The Arbitration Agreement, and its Awards* (3rd edn, Dar Al Nahda Al Arabiya 2008) 230-234

[148] Ibrahim M. Draig, (n21) 66

[149] Ibid

Article 11 of the Arbitration Act of 2016 has caused significant controversy in application and practice, by not clearly identifying which procedures to follow.

It is the jurisdiction of the court to ratify the application for an interlocutory order because it does not contradict the authority of the Arbitration objectively.[150] However, it was necessary for parliament to go further to make the unconditional jurisdiction for the tribunal 'after its formation' to issuing the order of interlocutory procedures, and does not make the jurisdiction of interlocutory procedures shared between the public judiciary and the arbitrator, by changing the word 'or' in the text of Article 11 of the Arbitration Act 2016, for example.

Chapter II of the Act entitled Arbitration Tribunal has been developed under the following subheadings: Constitution of the Tribunal; Capacity of the Arbitrator; Selection and Appointment of the Tribunal and Arbitrator; Written Consent and Disclosure of the Arbitrator; Challenge of Arbitrator; Procedures for Challenging an Arbitrator; Appointment of a Substitute Arbitrator'; Costs of the Arbitration 'Tribunal'; and Establishment of Arbitration Centres.

Article 14 is concerned with the appointment of the President of an arbitral tribunal; the appointment and removal of arbitrators are among the most critical features of arbitral proceedings. First, the article left the matter of an appointment of the President of the Tribunal to the arbitrators, in the case of their failure to do so, the competent court will choose it at the request of one of the parties to the proposed arbitration.[151]

The second case is where an arbitral tribunal is composed of one arbitrator. He/she is to be chosen by the parties to the dispute; if they fail to appoint an arbitrator, the competent court will appoint him/her upon the request of a party.[152] In this connection, in the Sudanese Supreme Court's ruling in case of *Inter Tread Co. v. Ataco Co*, the Court decided to appoint an arbitrator when one of the parties refused to appoint one.[153]

Article 10 of the UNCITRAL Model Law, states that:

> *"Failing such determination, the number of arbitrators shall be three. If a party fails to appoint the arbitrator within thirty days of*

[150] Nygh Peter, *Autonomy in International Contracts*. (Clarendon Press, 1999) p 11.
[151] Redfern and Hunter (n91) 219-22
[152] Ahmed Sharaaf Elddin (n80)
[153] *Inter Tread Co. V ATCO ATCO Co,* {2006} No. RB/ 210 / 2006

> *receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court."*[154]

When it comes to appointing one arbitrator, each party may propose to the other the proposed arbitrator[155]. The Explanatory Note on the Model Law, (Article 11) stated under the title the "recognises the freedom of the parties to determine, by reference to an existing set of arbitration rules or by an ad hoc agreement, the procedure to be followed, subject to the fundamental requirements of fairness and justice."[156]

Other arbitration legislation confirms the parties' autonomy whereby they can choose the tribunal, directly or indirectly.[157] There is another issue, which is not addressed by the Sudanese law: where three arbitrators are to be appointed, each party chooses one. The other two arbitrators nominate the third one, who assumes the chair of the arbitral tribunal[158]. Besides, the text should have provided that no one should be prevented from being an arbitrator on the grounds of her/his nationality or religion.

Article 15 of the Arbitration Act 2016 provides that 'Acceptance by the arbitrator of his task shall be in writing**.'** This Article requires the arbitrator to accept his/her engagement in writing since the fundamental principle in the arbitration process is to ensure that an arbitration agreement exists.[159] Sudanese law seems to have moved from the formality to the substantiality by making the requirement of the writing of an arbitration agreement essential so that its existence and validity could not be questioned. Therefore, both parties sign an agreement, and the parties exchange letters or other written means of communication.[160] In the case of *Locklear Contac Corp. v. Remote Solution Co. Ltd* [161]

[154] Article 10 the UNCITRAL Model Law 1965
[155] Chancellor Hussein A. Abualgasim (n104)
[156] Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration, as amended in 2006, 23, (UNCITRAL. Org 4 December2006) available at www.uncitral.org. Accessed at 21 October 2017
[157] Article 22 of the Saudi Arbitration System No./46 /1404
[158] Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries*, (3rd Edn, Kluwer Law International, 2011) 403
[159] G. Born, (n74) 1377-81
[160] The UNCITRAL Model Law 1965, Article 7(2), Definition and form of arbitration agreement shall be in writing
[161] *Locklear Automotive Group, Inc. v Hubbard*, (2017) WL 4324852 (Alabama Sept. 29, 2017)

> *"...(The) Defendant argued that it could not be compelled to participate in arbitration because the plaintiff was a non-signatory to the arbitration agreement which the defendant had signed with plaintiff's predecessor."* [162]

The arbitration agreement must meet specific formal and substantive requirements for its validity.[163] Indeed, some jurisdictions require that it must be void if it is not in the form of writing. The legislature has not adopted this provision. Also, the consent to arbitration must come from a person or an entity eligible to give her/his consent.[164]

Article 17 of the Arbitration Act 2016 provides for the procedures for the removal of an arbitrator. According to this article, an application for an arbitrator's removal must be made in writing to the competent court within seven days from the date on which the party to the arbitration learned of the formation of the arbitral tribunal. Alternatively, as of the date on which the party to the arbitration became aware of the reasons justifying the removal of the arbitrator. In contrast, in most countries, the arbitrator may be removed at any time during the proceedings.[165] Article 17 of the Arbitration Act 2016 stipulates that:

> "*(1) Application to challenge the arbitrator shall be presented in writing to the competent court, shown therein the reasons of challenge within one week of the date of knowledge by the applicant of challenge, or by any reasons, arising during the procedures of arbitration, justifying the challenge.*
>
> *(2) Where the Arbitrator, requested to be challenged, does not step aside, the court shall determine such application as soon as possible, and its decision shall be final. The procedure of Arbitration shall be stayed during such period.*"[166]

Because of the principle of the independence and neutrality of the arbitrators, most national legislations give the parties the right of rejection of the arbitrator[167]. The reasons could include the lack of neutrality or independence of an arbitrator[168]. Article 17 of the Act, overlooked a fundamental rule of arbitral proceedings, which is the freedom of both parties to

[162] Ibid 21

[163] John P. Gaffney *The Law Applicable to the Arbitration Agreement* (ICC, 2004)

[164] Sutton, David St. John, and others , *Russell on Arbitration* (21st edn, Sweet & Maxwell, 1997) 302

[165] See Applying to Court to Remove an Arbitrator under English Arbitration Act, 1996, s 24

[166] Arbitration Act 2016 , art 17

[167] John P. Gaffney, *The Law Applicable to the Arbitration Agreement*, (ICC, 2004) 121

[168] ibid

agree to the rejection of arbitrators. Also, one week to request the court for his/her removal is rather short.

Article 13(1) of the UNCITRAL Rules provides that a party must notify a challenge within 15 days of learning of the grounds for the challenge:

> *"A party who intends to challenge an arbitrator shall send notice of its challenge within 15 days after it has been notified of the appointment of the challenged arbitrator, or within 15 days after the circumstances [on which the challenge is based] became known to that party."*[169]

Similar provisions are contained in other institutional rules.[170] It can be argued that the decision of the court in such a case, does not lead to the invalidity of the proceedings or annulment of the award if it has been made before the court renders its decision.[171]

According to this Article, if an arbitrator withdraws from his office, or if a party agrees to terminate an arbitrator's mandate, this would not imply that the grounds for challenging him are accepted either by him or by the relevant party. The existence of such a provision can be regarded as a relief for the arbitrators to cease their functions[172]. It may be asked whether that provisions regarding challenging an arbitrator are mandatory provisions, or the parties are allowed to agree upon different rules for challenging arbitrators. If one refers to the party autonomy rules particularly about the procedural laws of arbitrations, then perhaps this provision may be regarded as mandatory. Sudanese arbitration law, however, can be criticised for not containing an explicit provision similar to Article 14(2) of the UNCITRAL Model Law.[173]

However, the right to make an application for the rejection of the arbitrators by one of the parties is not haphazard. Reasons for rejection after the appointment of an arbitrator could be disclosed after the appointment of an arbitrator; the two parties are free to scrutinise their quality even though they were acquainted with the arbitrator's CV. However, the arbitrator is legally bound to declare and make known anything that can raise doubts about his neutrality

[169] The UNCITRAL Model Law Article 13(1)
[170] See, e.g., ICC Rules 2012, Art. 14(2); LCIA Rules, Art. 10(4); ICDR Rules, Art. 8(1); PCA Rules, Art. 11(1); VIAC Rules, Art. 16(2); SIAC Rules, Art. 11(1).
[171] Abdel Hamid AL Hadab, *Arbitration with the Arab Country*, (2 edn, Kluwer Law International, 1999) 309
[172] Mahmoud A. Omar Althioi, (n147) 26
[173] Ibrahim M. Draig, (n31) 64

or independence. Most of the legislation point out the reasons for the rejection of an arbitrator on the grounds on which judgement of the court may be rendered.

This is an essential chapter in any arbitration legislation. Most of the subheadings under which this chapter has been developed are found in most other arbitration legislation. However, it may be pointed out that there exist plenty of examples of bias in arbitrations and arbitrators even after their appointments have been confirmed.[174] Therefore paragraph 16.2 (under Challenge of Arbitrators) should be reviewed, saying that in the event of an allegation of bias against a tribunal or an arbitrator, the tribunal should consider that issue. If its conclusion is not accepted by the party which brought the allegation of bias, they shall have the right to refer the matter to the local judiciary.

Also, the costs of arbitration rather than the costs of the arbitration tribunal (clause 19.1) are usually incorporated into a Schedule to the Act. In Sudan, the parties are supposed to share arbitration fees. Article 19 formed a new method for the arbitration tribunal fees and issued an index of fees to be followed in case of any disagreement on fees.[175] The Ministry of Justice influenced the wording on the issue of the payment of arbitration fee and the arbitration rules usually handle the fees issue,[176] or under the institutionalised arbitration,[177] but the Arbitration Act 2016 has changed that practice to use it in ad hoc arbitration.[178] Therefore, the provision of Article 19 (1) should make it clear that the parties are required to pay all costs in equal share, including the costs of hiring accommodation, refreshments and administrative expenses. This article explains that the arbitration agreement determines the payment of arbitrators' fees, and it provides that all other expenses of arbitration proceedings must be shared between the parties on an equal basis.

On the remuneration of the arbitrators, the text does not explain the criteria for determining fees. In the absence of any agreement between the arbitrators and parties, this could pose a significant obstacle to moving forward with arbitration. Because of the dispute that may arise

[174] M. Draig *Presentation of Solutions to the Problems of Practical Application of the Arbitration Act 2016*, (1st edn, Khartoum, El-dar El-Sudaina Press, 2017) 118

[175] Similir to the Egyptian Law of Arbitration 1994, the Saudi Law of Arbitration 2012 and the Model Law.

[176] UNCITRAL Arbitration Rules Articles 40–43.

[177] ICC Arbitration Rules 2017, Appendix III.

[178] Ad Hoc arbitration is popularly used in Sudanese institution but the institutional arbitration is yet to be accepted by the practitioners.

between arbitrators and parties, it suggested that arbitrators' fees be annexed as a schedule to the Act.

Third, Article 50 increases the power of the Minister of Justice to allow, investigate and exclude arbitration centres, retroactively. Thus, all registered arbitration centres functioning in Sudan have to adjust to any new rules that the Minister may adopt. Moreover, because the provisions for the Arbitration Centres and Arbitrators should have been incorporated at the beginning of the Act: Chapter I, the title of Article 50, is "Arbitration Centres and Arbitrators". It is necessary to mention here that the arbitration centres registered in Sudan as 'Business Name licence' are not institutions within the meaning of Article 50. That means that there is no actual existence of an Arbitration Institution governed by the text of this Article, since under a 'Business Name licence' a claimant may be sued in the name of the owner. However, the owner of the 'Business Name licence' will become personally liable in case of any breach of the law.[179] Consequently, the Act should be referred to Arbitration Institutions instead of Arbitration Centres because there is no actual application of this section in practice.

Chapter Ill of the Act, entitled Arbitration Procedure, has been developed under the following subheadings: Arbitration Agreement Applied; Commencement of Arbitration Proceedings; Arbitration Venue: Language of Arbitration; Statement of the Arbitration Suit; Hearing of the Suit; Appearance and Non-appearance; Seeking help from the Court; Seeking help from Expert; and Proceedings in Arbitration Procedures.

The section entitled the Arbitration Venue is redundant because of two main reasons: (a) that in the case of delocalised arbitration, the venue of arbitration is determined by the parties concerned; and (b) once the jurisdiction has been determined, it is for the local arbitration institutions to determine the venue, and they also determine the fixed costs of arbitration.[180] Furthermore, if the location of the contract is in Sudan, the place of arbitration should also be in Sudan.

Article 24 of the Act presents a unique problem. If the language of arbitration is to be Arabic, the non-Arabic speaking parties may be reluctant to initiate arbitrations in Sudan.

---

[179] Muawiya Osman Al - Haddad, '*The Intervention of the Sudanese judiciary in Arbitration, Assistance and Supervision*' (1st ed, Dar El-nahir Press, 2017) 247

[180] Ibrahim Q. 'Taha, Electronic Arbitration' Journal of Arbitration, Khartoum, Vol. 2 No. 211

Article 28 does not provide for the fees of experts; it is vital to bear in mind that the calling of expert witnesses is very common in commercial arbitrations.

Article 30 of the Arbitration Act 2016 under the title 'Proceeding in the Arbitration Proceedings', provides that;

> "*1 If the tribunal finds during the arbitration procedures an issue out of its Jurisdiction, it may: a. Proceed, if it seems that the issue is not substantial to determine the dispute (b) stop the proceeding if the issue is substantial to determine the dispute until a final court judgment is issued. Accordingly, the period set for the award shall be suspended.*
> *2. If a document submitted to the tribunal and has been contested with forgery, the contested party shall notify the tribunal within a week of the legal procedures processed by him. In this case, the tribunal shall proceed with one of the following procedures :(a) Proceed with the arbitration procedures if the document is not substantial to determine the dispute. (b.) Stop the proceeding, if the document is substantial to determine the dispute until a final court judgment is issued on the issue of forgery. Accordingly, the period set for the award shall be suspended''*.[181]

The title of Article 30 is inappropriate to deal with the applications or appeals submitted during the hearing, because if this application goes out of the jurisdiction of the arbitration agreement, or there is a dispute on the validity of documents submitted by one of the parties,[182] the arbitral tribunal must continue the proceedings if it considers or has verified that a decision on this application or appeal is not necessary or relevant to the subject matter of the dispute in connection with the arbitration.[183] If this application is essential or challenging the subject matter of the dispute, the arbitral tribunal shall suspend the arbitral proceedings pending the decision on this application or criminal prosecution within the suspension period.[184] This Article should first enquire of the timing of any judicial intervention. The issue becomes significant when one of the parties to a dispute makes an application to a court with supervisory competence over the arbitration, asking that the proceedings be stopped or that a case is heard notwithstanding an alleged arbitration clause[185]. Between these two extremes, many legal systems provide a hybrid-timing solution that varies according to the specific manner in which an arbitral jurisdiction has been challenged.[186] One standard might apply when legal action is brought in respect of matters

[181] Article 30 of the Arbitration Act 2016
[182] Sundra Rajoo, (n85) 627
[183] Ibid
[184] Redfern and Hunter, (n81) 219-29. In England, for example, one can see the interaction of the 1996 Act, section 9 (stay of legal proceedings in respect of matters referred to arbitration).
[185] Muawiya Osman Al – Haddad (n179) 232
[186] W. W. Park, 'Arbitration of International Business Disputes', (2nd edn, Oxford University Press, 2012) 334

purportedly referred to arbitration. Another rule might pertain to the motion for a declaratory judicial determination of preliminary jurisdictional questions.

Also, using the word "information" in the text is unfortunate, because it is inconceivable that where for example forgery is alleged, the documents will be submitted for the first time to the arbitral tribunal. Therefore, the exclusion of those words from the text of the Article would be an improvement in order to avoid confusion.

The Article should include procedures as to how to assess documents which are suspicions. It should include an assessment of documents by an arbitral tribunal whether the documents concerned are essential or secondary, and write a report on what was in front of the arbitral tribunal to the competent authority, to the determination of any crime evidenced by the document.

Furthermore, Article 30 created confusion: the Arbitration Act 2016 held the principle of Competence-Competence under Article 6(1) (b); however, Articles 17 and 30 do not allow the tribunal to determine on the merit of the dispute in case of the jurisdictional issue, or in the event of any challenge against an arbitrator.[187] This proves that the court is not supporting the arbitral process but rather is supervising it. However, Article 30 is somewhat irrelevant because it is common practice for both Applicants and Respondents to submit their Claims and Responses with documentary evidence in support of their claims and responses. Dr Farah believes that the Sudanese legislator[188] was very successful when he stated in article 30 that "*Stop the proceedings if the issue is fundamental to determine the dispute until a final court judgment is issued* ''. He cited many of the laws of the Arab countries, particularly the Egyptian law, which does not comply with the necessity of suspending arbitral disputes during arbitration proceedings until a competent court rendered the order. It may result in the loss of the efforts of the arbitral tribunal because the competent court can revoke arbitration proceedings and refer the dispute to the court. In England, the courts were empowered to be interventionist and on occasions were, but allowed most cases to go to arbitration.[189] Therefore, the proceedings should have been suspended until the final decision

[187] Ahmed Bannga (n5)

[188] Mohammed A. Farah, 'The Necessary Substantive Rules for an Arbitral Award' (1st edn, Khartoum University Press, 2017) 272

[189] Redfern and Hunter (n81) 122

on the interlocutory matter was resolved and appealed in the light of the court's decision. Also, in *Ellis Mechanical Services Ltd v Wates Construction* [190] Lord Denning M. R. explained that:

> *"It seems that if a case comes before the Court in which, although a sum is not precisely quantified and although it is not admitted, nevertheless the Court is able, on an application of this kind, to give summary judgment for such sum as appears to be indisputably due and to refer the balance to arbitration. The defendants cannot insist overall going to arbitration by merely saying that there is a difference or a dispute about it. If the Court sees that there is a sum, which is indisputably due, the court can give judgment for that sum and let the rest go to arbitration."*[191]

Chapter IV of the Act entitled Award of the Arbitration Tribunal consists of the following subheadings: Permissibility of Reconciliation; Permissibility of Settlement; Issuing the Award; Award of Arbitration Tribunal; Arbitration Proceedings Terminated; Arbitration Tribunal Task Terminated; Keeping the Record of Arbitration Suit; Interpretation of the Arbitration Tribunal Award; Rectification of the Award; and Revision of the Arbitration Tribunal Award**.** Arbitral tribunals have their inherent authority to recommend the parties to reconcile or settle the dispute on a friendly basis, usually through their lawyers, during the proceedings[192].

Article 31 provides for reconciliation. There is a direct mandate to the arbitral tribunal to consider reconciliation by the rules of justice and equity[193]. The arbitral tribunal should render a majority award by agreement within six months from the date of commencement of an arbitration proceeding or within the period agreed to by the parties themselves[194]. Many arbitration instruments provide for the possibility of consent awards. Article 30(1) of the UNCITRAL Model Law provides that, if the parties settle their dispute, the tribunal "shall," "if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms"; similar approaches are adopted in other arbitration legislation and judicial decisions.[195]

---

[190] *Ellis Mechanical Services Ltd v Wates Construction Ltd* (1976) 2 BLR 57

[191] Ibid page 35

[192] Mohammed A. Farah (n188) 279

[193] Aiste Sklenyte, 'International Arbitration: The Doctrine of Separability and Competence Principle', http://docplayer.net/ 2003.

[194] ibid

[195] See, e.g., English Arbitration Act, 1996; G. Born, 'International Commercial Arbitration' (2nd edn, Kluwer Law International, 2014) 2435–38. He pointed out that the New York Convention and other leading arbitration conventions are silent on the question of consent awards.

Most institutional rules also provide that tribunals may make consent awards if requested to do so by the contracted parties.[196] Both national laws and institutional rules provide that the general requirement that awards be "reasoned" does not apply to consent awards.[197] Where an arbitral tribunal fails to render an award, the President of the tribunal shall take decisions on the procedural aspects if agreed to by the parties or all members of the arbitral tribunal.

Most arbitration regimes permit the tribunal to terminate an arbitration proceeding without an award. Article 32(2) of the UNCITRAL Model Law provides for the termination of arbitral proceedings by "order" if: (a) the applicant withdraws his or her claims, "unless the respondent objects thereto and the arbitral tribunal recognised a legitimate interest on his part in obtaining a final settlement of the dispute"; (b) the parties agree to terminate the proceedings, or (c) that the continuation of the arbitration has "become unnecessary or impossible." [198]

Most legislation is silent concerning the termination of arbitral proceedings without an award. Arbitrators have implied authority – in limited cases of settlement, impossibility and claimant's withdrawal of its claim – for example; an arbitral tribunal may terminate proceedings without an award.[199]

There are cases where the parties agree to settle their dispute during the arbitration proceedings; in such cases, the arbitral tribunal may confirm the settlement in the form of an arbitral award on agreed terms[200]. This award will have the same status and the same legal effect as any other award issued on the similar subject of the proceeding[201]. This ambiguity between the roles of the arbitration institution and rules and the arbitration law is also recognised in Article 37 (keeping the record of arbitration suit)[202]. It raises the question about the task of the arbitral tribunal after issuing the award in an ad hoc arbitration while the

[196] Sundra Rajoo , (n116) 629

[197] Ibid

[198] e.g., *Photopaint v. Smartlens* (1988) 335 F.3d 152 (2d Cir. 2003); Judgment of 8 March 1988: Sociétés Sofidif *v OIAETI* (1989) Rev. arb. 481, French Cour de cassation civ. Le.

[199] G. Born, (n74) 1610–12

[200] Dicey and Morris, The Conflicts of Laws, (13th Edition, Sweet and Maxwell, 2000) 302

[201] Ibid

[202] Kamil Idris (n4)113

arbitration centres' rules[203] include such an order. It requires the arbitrator to hold the record of the arbitral proceedings for five years. The provisions of Articles .33 and 34 could have been combined, as both are concerned with the rendering of arbitral awards. By the same token, Articles 35 and 36 should have been combined too. It is interesting to see that the 2016 Act has provided for revision of an arbitral award[204] as revisions of awards are not usually allowed. However, minor rectifications in an award (mathematical or typographical errors) are allowed.

Chapter V of the Act entitled Arbitration Tribunal, its Context, Executive Bindings and the Authority to Issue Regulations contains the following subheadings: Arbitration Tribunal Award Binding; the Arbitration Tribunal Award Nullity; Nullity Request; Procedures for Reviewing the Nullity Request; Dispute Submitted to the Competent Court; Execution Stayed; Requirements for Execution; Execution of the Foreign Arbitration Award; Appeal of Execution Dicier; and Issuing Regulations, Rules and Orders.

This Act reinstated the text of Article 41 of the Arbitration Act 2005, which provided for the grounds of Nullity of an arbitral award in five cases. The new Act in article 42 (1) increased them to seven grounds for the nullity of an award. However, these eight grounds in the new Act seem to have been borrowed from the text of section 52 of the Egyptian Arbitration Act 1994. These grounds will be unworkable; their legal philosophy is very different from those in Sudan. Moreover, in respect of nullity of awards, the Egyptian law grants the court in Egypt more discretionary powers than the Sudanese courts enjoy.[205]

Furthermore, Paragraph 42 (1) of the Arbitration Act provides that

> *"Both parties may request the dismissal of the arbitration tribunal award, for nullity, from the Appeal Court to any of the following reasons..."*[206]

The Act granted competence to the Appeal Court to nullify an arbitral award when one of the grounds stated in the article (1) is available. Article 4 of the same Act defines the initially competent court to consider the dispute if it is not submitted to arbitration. The competent court is always the court of the first instance and not the Court of Appeal. On the other hand,

[203] ICC Arbitration Rules 2017, Article 35, which establishes the role of the Secretariat in providing verified drafts of the award.
[204] Article 40 of the Arbitration Act 2016
[205] Mohammed A. Farah (N188) 156
[206] Arbitration Act 2016 Art 42 (1)

under the Act, there exists the opportunity to appeal an arbitral award; this contradicts the concept of arbitration bearing in mind that that arbitration is a private method of settling disputes. Nevertheless, the provisions of paragraph 42(1) of the Sudanese law violates all the arbitration laws of the Arab countries and international conventions on arbitration[207]. Also, the Act disregarded some of the most critical grounds for nullifying an arbitral award, on the grounds of namely, on the grounds of corruption and misconduct of the arbitrators.

The arbitral tribunal must determine any dispute between the parties that have been referred to them fairly and impartially without not being neutral.; in the case of *Sudan Cotton Co. Ltd. V Mutacot International Trade Co, Ltd*[208], Sudan Cotton Company submitted to the court an application to nullify this arbitration award, which had been issued by the Arbitration Tribunal following a dispute that had arisen between the two parties. The applicant had supported the nullification application on the grounds of the misconduct and the lack of independence of the arbitrator(s), which contravened paragraph 1 of the Arbitration Act 2016, the governing Act at the material time, where one of the arbitrators was employed as a lawyer by the defendant. He had a financial interest in the outcome of the proceedings, and the arbitrator had a controversial relationship with the defendant, which exceeded the limits of the relationship of a lawyer with his/her client. The arbitrator also had already disclosed his legal opinion on the same dispute and the parties through the papers that were published in some legal journals; all this occurred before the formation of the arbitral tribunal. The court, in this case, held that:

> *"...The documents attached to the claim of arbitration and shreds of evidence associated with the application of this allegation, as revealed that the mentioned arbitrator has appeared to lack impartiality and independence and there would be justifiable doubts as to independence, corruption, and misconduct. The applicant has a genuine argument and that the award of the arbitrator was unfair in fact. The Court, therefore, considers accepting the appeal filed under this ground to nullifying the award on this allegation and the court set aside an award on the basis that the arbitrator had violated the text of paragraph 13 and 41(B) of the Arbitration Act 2005..."* [209]

Moreover, Article 16 of the Arbitration Act of 2016 did not require that "an arbitrator prohibited from disclosing his opinions or information related to the dispute under proceedings". The duties of an arbitrator may be divided into three categories: duties imposed

[207] Ahmed M.Abdel Badi Sheta, *The Arbitration an Explanatory and Comparative Study of Judicial Provision & Arab and International Arbitration Institute* (3rd Edition, Daar AL Nahda Al-Arabiya, 2009) 602
[208] *The Sudan Cotton Co. Ltd. v Mutacot International Trade Co, Ltd, Khartoum* (2018) N674
[209] Ibid 127

by the parties, duties imposed by law, and ethical duties.[210] However, the Act is silent on the legal and personal liabilities of an arbitrator who would be in breach of such a fundamental duty.

In the case of ad hoc arbitration, in particular, the contract of the arbitrator should clearly state the scope of the functions and the duties arising under the contract, which must also be agreed to by the parties to the arbitration[211]; the parties also are required to place good faith in their arbitrator (s).

In arbitrations of any type, each of the arbitrators must be impartial. The bias of arbitrators is known in the world of arbitrations. However, two reasons usually occasion bias: (a) the arbitrator himself or herself is not bias-free, and (b) because of the financial remuneration being paid for by parties to arbitration, he or she may feel obliged to find in favour of the party who pays for his or her remuneration.[212] Under the UNCITRAL Model Law, jurisdiction will be denied if the impartiality or independence of arbitrators is questioned. An ethical code of conduct should be given to each arbitrator, and a declaration should be taken from each of them to give understanding that they will abide by the code.[213]

The approach of the Sudanese court in the above case can be traced back to *Morgan v Mather*[214] (there being a strong English legal influence on the development of Sudanese law) where Lord Commissioner Wilson explained that:

> "*It would be a melancholy thing, if, because we differed from the arbitrators in point of fact, we should set aside awards. The only grounds for that are, first, that the arbitrators have awarded what was out of their power; secondly, corruption, or that they have proceeded contrary to the principles of natural justice, though there is no corruption as if without reason they will not hear a witness; thirdly, that have proceeded upon mere mistake, which they themselves admit*." [215]

On the other hand, *in Hodgkinson v Fernie*,[216,] where *Williams J* said that the intervention by the court could not be justified, he explained that:

---

[210] Redfern and Hunter, (n32) 215

[211] Ibid

[212] G. Born, (n45) 1940-1941, see also *Saxmere Company Ltd v Wood Board* (2009) NZSC72,

[213] Holtzmann and J Neuhaus*, A Guide to The UINCITRAL Model Law on International Commercial Arbitration: Legislative and Commentary,* (Kluwer Law International, 1989) 388

[214] *Morgan v. Mather* (1792) 2 Ves Jun 15, 18

[215] Ibid 23

[216] *Hodgkinson v. Fernie & Anr* [1857] 3 C.B. (N.S.) 189, at 202

> *"This is simply the case of a reference to an arbitrator before who has arisen a question of law which he has decided, and, for this motion, must be assumed to have decided ill. I think we have no right to interfere. But it is said that the law upon this subject has been varied by the 8th section of the Common Law Procedure 1854 and that we ought under the authority of that section to send the matter back to the arbitrator, with the intimation that he has decided wrong, and a direction to decide otherwise"*[217]

The arbitration awards were meant to be final in relation to factual matters, and the final arbitration award could significantly avoid delays and reduce costs[218]. The arbitrator hears the witnesses and is best placed to give a considered view on the witnesses' statement. It would be advisable for the arbitral tribunal to include a lawyer's' if the subject matter of the dispute involves legal issues.[219] It might be argued that the arbitrator is better placed to judge a technical issue as he is usually appointed by virtue of his experience and knowledge on a specialised industry or area of business. An arbitrator should not overstep his jurisdiction under the arbitration agreement.[220]

However, there is an inconsistency in Article 15(2) of the 2016 Arbitration Act which mandated the arbitrator to report his impartiality and independence in writing as an undertaking. If so, what is the value of the disclosure of the arbitrators if the impartiality and freedom of the arbitral award is not the cause of the annulment of the arbitral award? It is argued that failure to report can, in itself, give rise to justifiable suspicions as to its impartiality.[221]

It was held in *Sundra Rajoo v Mohamed Abd Majed* [222] that a co-arbitrator also has *locus standi* to complain about non-disclosure by another co-arbitrator, which demonstrates the importance of disclosure. The practical significance of a failure to disclose is that an award rendered may be liable to be set aside on the basis that a breach of confidence has occurred,

---

[217] Ibid 75

[218] Holtzmann and J Neuhaus (n213) 320

[219] Aiste Sklenyte (n193) 214

[220] Sundra Rajoo (n116) 721

[221] *Forest Electricity Corporation v HCB Contractors* 1995 WL 37586, *3 (ED Pa 1995). However, cf *AT & T Corps v Saudi Cabk Co* 12000 2 Lloyd's Rep 127, CA (Eng) where an undisclosed (disqualifying) non-executive directorship of a competitor of one of the parties was not accepted as ground for setting award aside, given that the arbitrator was an experienced lawyer and arbitrator and the risk of bias was considered remote. However, this case was decided before the acceptance of the objective test and a different result would be likely today; see also Sutton, Gill and Gearing, *Russell on Arbitration,* (24th Edn, Sweet & Maxwell, 2015) 4-124.

[222] *Sundra Rajoo v Mohamed Abd Majed* 1201116 CLJ 923 at [lO(d)]: *Hodgkinson v. Fernie* (1857) 3 C. B. (N. S.) 189 34

such as the arbitrator being a judge in his cause. Even a consent award can be set aside when tainted by impropriety.[223]

In the case of *GiIlies v Secretary of State for Works and Pensions (Scotland)* [224] Baroness Hale observed that:

> *"Impartiality is not the same as independence, although the two are closely linked. Impartiality is the tribunal's approach to deciding the issues before it. Independence is the structural or institutional framework which secures this impartiality, not only in the minds of the tribunal members but also the perception of the public".* [225]

Although the lack of independence does not always equate to an absence of impartiality, Gary Born[226] argues that the distinction between impartiality and independence is given undue importance. He also cited that a lack of independence is only a concern because it can lead to that lack of impartiality. It can also undermine the appearance of justice being delivered.

The great frustration with the Arbitration Act 2016 appears under Articles 42, 43 and 44, which replaced the previous process for supporting the Nullification Application.[227] After specific actions to guide the Appeal Court in deciding on the Nullification Application, Article 44 (6) grants the Appeal Court the power to follow the same process it practices for litigation. It means that the court can review the merit of the dispute and its order will be subject to appeal before the High Court following the Civil Procedure Code Rules of Recourse as mentioned above.[228] Also, Article 42.1.a is flawed since it stipulates that "where there is no arbitration agreement or is null, applicable to be null or ceased."

All the articles mentioned above of the Arbitration Act 2016 show the confirmation that the Minister of Justice intended to undermine the finality of the arbitral award. The new wording grants the Appeal Court with the jurisdiction to decide an arbitral awards' nullification

---

[223] As occurred in *Dab' Dr Muhammad Ridzuan bin Mohd Salleh v Syarikat Air Terengganu Sdn Bhd* [2012] 3 MU 737

[224] *Gillies v Secretary of State for Works and Pensions (Scotland) UK*, HL 2, [2006] 1 All ER 731

[225] Ibid

[226] G Born, (n47) 1810

[227] The Nullification Application in Arbitration Act 2005 and Arbitration Act 2016 is the application or the request to set aside the award.

[228] Civil Procedure Code 1983 Art 189 empowers the High Court to review the Appeal Court decision and Art 197 grants the same court the right to review its decision. This gives the award subject to three levels of appeal, which is the same set of proceedings in litigation.

application under the seven grounds of Article 41, which is similar to the Model Law. However, the wording of Section (6) is very deformed. It states:

> *With prejudice to all the above sub-articles, the same procedures followed in the appeal court to examine the appeal shall be followed in the nullity recourse*.[229]

This wording of Section (6) is challenging; it refers to the nullity recourse rather than the nullity application. It allows the Court to apply the rules of the Civil Procedure Code when the 'recourse' is considered. This means that the decision of the Appeal Court is not final and will be subject to examination by the High Court.[230] However, the practical application of Article 41 of the Arbitration Act 2005 was evident in the examples and cases above discussed. In Fisal Bank v. Osman Musa,[331] the Court noted:

> *The Nullification Suit is not a separate suit relevant to all rules of appeal under the Civil Procedure Code. This is because the purpose of the arbitral proceedings was set to reduce the time of adjudication and its domains.*[332]

The great disappointment with SAA 2016 arises from Articles 42, 43 and 44. This modified the previous remedy direction or the Nullity Order. After detailed measures to direct the Court of Appeal in its decision on the Nullity Request, Article 44(6) confers on the Court of Appeal the power to pursue the same procedure as that used in the case of litigation. This means that the court can examine the merits of the dispute and that its order will be subject to an appeal before the Supreme Court in compliance with the provisions of the Civil Procedure Code 1983 Rules of Recourse as set out above. [233] Ahmed Bangna noted,[234] in his interpretation of Article 44 (6) of the Arbitration Act 2016, limited the importance of the wording. He believes that the provision of Section (6) only provides that the appeal court shall follow the procedural rules in giving its decision. It does not eliminate the finality of the arbitral award that has been overlooked in Sudanese jurisprudence for years.

[229] Arbitration Act 2016, Art 44(6)
[230] Civil Procedure Code1983 Articles 189–202
[331] C.R/86/2007-Revision/21/2008 (n12)
[332] Ibid
[233] See Chapter 3.3 ' The situation after enactment of the Arbitration Act 2005 section'
[234] Ahmed Bannaga (n43)

3.6 Conclusions

This chapter made a critical examination of the current provisions of the Arbitration Act in Sudan. It presented the deficiency in the current Act in dealing with arbitrations and the gaps in certain concepts. The discussion shows that the current Act does not, in general, covers all the issues relating to arbitral proceedings. Concerning the arbitration agreement, the current Act does not explicitly provide whether an arbitration agreement should be in writing. The examination showed the significant changes of the Sudanese Law, which was borrowed from the Egyptian, Saudi Arabian, and Jordanian Arbitration Laws.

The appeal and the review of the arbitral awards provided to the Court of First Instance pursuant to the Arbitration Act 2005 have been modified by the Act of 2016 to appealing to the Court of Appeal, [235] and by ensuring that the arbitration meets a particular mechanism rather than by making decisions on any nullity application suit.

It will provide analytical data about arbitration, which is a limited connection in the availability of data against which to evaluate the growth of arbitration in Sudan. With this new course, arbitration practitioners will be aware of the court and arbitral proceedings in charge of arbitration, and it will improve confidence in the litigation process in support of arbitration. The judiciary should be allowed to train the judges in the arbitration to improve the quality of decisions. Those judges will later be upgraded to the High Court, which supports the Judiciary to be more effective in guiding the arbitral proceedings. These changes may provide arbitration practitioners hope that the Appeal Court will be supportive of arbitration and interpret the law of arbitration. As at the time of publishing no court decision on the Arbitration Act 2016 has been published to confirm this notion.

It is worth pointing out as a coda that the establishment of the Arbitration Affairs Department in the Ministry of Justice to manage arbitration activities, including the licensing of arbitration centres and institutions, the branches of foreign arbitration centres, the licences of arbitrators and their registration at the National Register for arbitrators, are significant new developments in the Sudanese arbitrations system, which should encourage parties to arbitrations, to settle their disputes by arbitration in Sudan. However, none of the Acts considers the electronic arbitration centres, which appear on many websites. Such arbitration centres might be the future of international arbitration.

[235] Arbitration Act 2016, Art 44

Although the Arbitration Act 2016 has included most of the usual provisions concerning arbitral proceedings, both domestic and transnational, it should be emphasised that unless the arbitration procedures are aligned with the expectations of private foreign investors, and that the image of the court system in Sudan is improved, it might be difficult for Sudan to attract many private foreign investors. This is not to suggest that the courts and judges in Sudan lack any competence. However, the court system must create a better image in the eyes of foreign investors. It is also essential that eminent arbitrators' names appear on the list maintained by the Arbitrations Centre in Khartoum. Finally, the Government must consider whether the judiciary should be separable and separate from the executive branch of the government.

The next chapter examines the definition of 'arbitrability' and how to select and identify the subject of the arbitration, whether in the arbitral agreement or arbitral clause and the importance of such selection to the validity of the arbitral agreement. The chapter also will examines the arbitrability under the Sudanese law such as matter not capable of being arbitrated of disputes relating to the public policy of Sudan.

Chapter 4 Arbitrability

4.1 Introduction

The overlap of statutory laws that seem to operate in different areas has been a continuing challenge to arbitration, traditionally, in the form of concerns about the possibility of arbitration in settling disputes.[1] Arbitrability is a method for determining whether a dispute may be subject to arbitration proceedings and the drafting of the arbitration clause in the contract must be considered as the key responsible element for determining arbitrability in a dispute[2].

There have been efforts to improve and revise arbitration law in Sudan to promote it as a modern country where arbitration is a viable method of resolving disputes. Unfortunately, such attempts have overlooked some of the relevant problems that exist. As a consequence, this chapter critically examines arbitrability under Sudanese law. It attempts to engage in an analysis of the public policy differentials and the question as to why, in some instances, the public still reserve the resolution of disputes to state courts. This chapter then proposes an alternative test, and critically examines it intending to determine whether the new test contradicts the current concept of public policy and also considers whether the law is in line with international norms. The chapter reveals that Sharia law has developed the Sudanese legal system, including the concept of public policy in Sharia law, and is one of the main challenges that may influence the recognition of foreign arbitral awards under the New York Convention in Sudan.

Arbitrability involves determining which types of dispute may be resolved by arbitration and which belong exclusively to the domain of the courts. Both the New York Convention 1958 and the UNCITRAL Model Law 1985 are limited to disputes that are capable of settlement by arbitration.[3] Arbitrability imposes exclusive jurisdiction and substantive principles that determine the conduct of the arbitration process, the contents of the arbitration agreement and the award.[4] The agreement should be about a matter that may be resolved by arbitration. The

[1] Ahmed M. Sheta *'The Arbitration An Explanatory and Comparative study of judicial provision & Arab and International arbitration institute'.* (3rd edn, Cairo, Daar AL Nahda Al-Arabiya, 2009) 227-230

[2] Sundra Rjoo, *'Law, Practice and Procedure of Arbitration'* (2nd edn, Lexis Nexis 2017) 433

[3] Articles II (1) and V(2)(a) New York Convention, 1958; Articles 34 (2)(b)(i) and 36(1)(b)(i) Model Law,.

[4] Julian D.M Lew and Oliver Marsden, *'Arbitrability'* in Julian D.M Lew and Harris Bor *Arbitration in England, with chapters On Scotland and Ireland.* (Kluwer Law International, 2013) 402

agreement under which an arbitration proceeding is to be carried out must contemplate that the tribunal concerned will render an award which is binding on the parties to the agreement.

However, it is a fact that because arbitration is a private mechanism with public values that some types of dispute are suitable for national courts and are not capable of settlement by arbitration[5]. The notion of "arbitrability" may, purely as a semantic matter distinguish between issues that must be resolved before a party can be permitted to proceed and to arbitrate the merits of the dispute fully.[6] The essence of a submission to arbitration is that it is based on a contract to honour the award of an arbitrator and a mandate to the arbitrator to render a binding determination of the legal rights of the parties.

By contrast, sometimes a submission which is intended to provide an opinion or a recommendation to the future course of action will not be treated as a submission to arbitration because it is not permissible to arbitrate on the issue of personal status, marital status, or issues related to the validity of the marriage, and to prove descent, or criminal matters or issues concerning public policy.[7] Only decisions of national courts can resolve such disputes.

The legislators and courts in each country must balance the national importance of reserving certain matters of public interest to the courts but at the same time allow people the freedom to arrange their private affairs as they see fit.[8] In the international sphere the interests of promoting international trade, as well as international comity, have proven essential factors in persuading the courts to treat certain types of a dispute as arbitrable.[9]

It is worth mentioning that there is a distinction between the validity of an arbitration agreement and arbitrability. The validity of the arbitration agreement requires the consent of the parties. An otherwise valid agreement to arbitrate can be withdrawn on the ground of

[5] Ibid

[6] Cf. Howsam, 'The court has found the phrase 'question of arbitrability' not applicable in [certain] kinds of general circumstance where parties would likely expect that an arbitrator' (March 29, 2013) Electronic copy available at: http://ssrn.com/abstract=2241774 Arbitrating "Arbitrability" supra n.3, 537 U.S. 3 of 61, accessed 23 May 2016.

[7] Jose Maria Rossani, *Arbitration National and International, Progression* (Del Rey Publishers, 2007) 45

[8] Jan Paulsson, *The Idea of Arbitration,* Ch. 1 on 'The Impulse to Arbitrate, (Oxford University Press, 2013) 98

[9] *Mitsubishi Motors Corporation v Soler Chrysler Plymouth Inc*. (1985) 473 US 614, 105 S.Ct 3346 .136. See also, Sornarajah, 'The UNCITRAL Model Law: A Third World Viewpoint' (1989) Journal of International Arbitration, Volume 6 , 1989 7, at 16

fraud, mistake, the lack of capacity, or whether a claim is forbidden by virtue of being an issue of domestic law[10].

4.2 What is Arbitrability?

Arbitrability means determining which type of dispute may be resolved by arbitration.[11] Arbitration is a private mechanism for dispute resolution where the nature of the dispute is not reserved for national courts as such disputes as are not capable of settlement by arbitration.[12] The reason behind this is that judges are seen to be in a better position to understand and protect the national interest.

Arbitrability can be considered to be a critical concept of the arbitration process.[13] It is necessary to determine the characteristics of the dispute that is capable of being submitted to arbitration. It refers to the question of where the parties can settle their dispute and the question of whether 'state or private justice' will apply, given the facts of their dispute.[15] It also refers to the freedom of the parties and their power to agree and conclude an arbitration agreement[16].

The New York Convention is limited to disputes that are capable of being settled by arbitration within the national legal system.[17] On this point, Redfern and Hunter stated that:

> *"The significance of arbitrability should not be exaggerated. It is important to be aware that it may be an issue, but in broad terms, most commercial disputes are arbitrable under the law of most countries." [18]*

Indeed, commercial arbitration is a fundamental component of commercial transactions and consists of a set of rights in it. Declaring that it is not subject to arbitration *de facto* will lead to a breach of the purpose of arbitration laws, weaken the effectiveness of commercial arbitration and ignore the independence of the parties.

---

[10] Jose Maria Rossani (n7) 198

[11] Redfern and Hunter, *'International Arbitration',* (6th edn, Sweet & Maxwell, 2015) 148

[12] Ibid 151

[13] Stavros L Brekoulakis, *Arbitrability*: *International and Comparative Perspectives,* (2nd edn, Kluwer Law International, 2009) 48

[15] Ibid

[16] Julian D.M Lew and Oliver Marsden (n3) 410

[17] Articles II (1) and V (2)(a) The New York Convention 1958; see also Articles 34(2)(b)(i) and 36(1)(b)(i) the UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in (2006)

[18] Redfern and Hunter, '*Law and Practice of International Commercial Arbitration'* (3rd edn, Sweet & Maxwell, 2004) 154

The concept of arbitrability determines that it not be just a dispute which is capable of settlement by arbitration but also the issue of jurisdiction[19]. When the subject of arbitrability is raised within courts or arbitral tribunals, the grounds are either that a national law imposes the adjudication by domestic courts of individual claims or the matter of the dispute breaks the nation's significant interests, principles, and policies.[20] Park notes that:

> *"The central theme in non-arbitrability cases is a concern that arbitration of public law claims will injure society. Courts express a fear that public law issues are too complicated for arbitrators; that arbitration proceedings are too informal; or that arbitrators like foxes guarding the chicken coop, with a pro-business bias that will lead to under-enforcement of laws designed to protect the public."*[21]

The classic examples, which have frequently given rise to the concept of the non-arbitrability, include matters which relate to matrimonial status laws and other matters, which concern public order generally, such as criminal law matters that are not allowed to be settled by arbitration.[22] Further, the term arbitrability has been used in two ways. First: is the question of "arbitrability";[23] which examines the issues related to the existence, validity, and enforceability of the arbitration agreement.

An example is a case of in *Soleimany v Soleimany* [24] where Waller L. J. took the view that:

> *"Accordingly, it seems to us that the original arbitration agreement was a valid agreement and that it was within the jurisdiction of the arbitrator to consider questions of illegality in so far as they might affect the rights of the parties."* [25]

Arbitrators may only examine questions of the validity of the arbitration clause. The role of jurisdiction is for the courts or the tribunals' ability to consider a dispute. There is, however, a small exception to this rule. In Sudanese law, if a court is requested to refer a matter to

---

[19] Ahmed A. Bin Nagi AL Salahi, *Legal System of the International Commercial Arbitration*, University Institute for Yemeni Researches and Studies (2009) 403

[20] Patrick M. Baron and Stefan Linegr *, A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany,* International Arbitration, Oxford Academic Volume 19, Issue 11, March 2003

[21] William W. Park, *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration*, University of Georgia (1989) 700

[22] Ahmed M. Sheta,(n1) 404

[23] Steven H. Reisberg *The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited* The Review of International Arbitration, Arbitration Club (2009) Vol. 20 159 http://www.arbitrationclub.org/index.php/component/content/article/98-steven-h-reisberg accessed 31 October 2017

[24] *Soleimany v Soleimany* [1999] EWCA Civ 285

[25] [1999] QB 785 report

arbitration and during such reference, the court determines any issue about the jurisdiction of the arbitrator or the validity of the arbitration agreement, the decision of the court is binding on the tribunal.

Whether the party has to submit a specific dispute to arbitration, it may include two entirely distinct legal matters. First, a party may object to arbitration on the grounds that there is no valid and enforceable arbitration contract between the parties; second, instead, the party may claim that the singular dispute does not come within the scope of the arbitration agreement. The distinction between these two questions to arbitration is crucial, because each is governed by a different set of legal rules governing "who", and this indicates which forum - the court or arbitrator - is the umpire to decide the objection to arbitration.

Secondly, "arbitrability" is also used to refer to an objection that the dispute does not fall within the scope of the arbitration agreement.[26] The US Supreme Court, in the case of *PacifiCare Health Sys Inc. v. Book* [27] stated that:

> *"Since we do not know how the arbitrator will construe the remedial limitations, the question is whether they render the parties' agreements unenforceable and whether it is for courts or arbitrators to decide enforceability in the first instance".*[28]

If an arbitral tribunal decides on a dispute outside the scope of the agreement, it will be acted upon without a proper mandate, and the award can be set aside on the ground of non-arbitrability. The Supreme Court held the view that even though it was not evident if the arbitrability of the disputes decided by the parties would include unforeseen damages; it was for the tribunal to decide.

4.3 Arbitrability under Sudanese Arbitration Laws

Sudan has been carrying out policy changes to hold the country out as a suitable venue for domestic and international arbitration,[29] for example, the passing of the Arbitration Act 2016. However, most such practices at repairing the arbitration system have entirely overlooked the provision of arbitrability of disputes.

---

[26] Steven H. Reisberg (n21) 159

[27] *Paciflcare Health Sys. Inc. v. Book* 538 U.S. 401 (2003)

[28] Ibid page 289

[29] Ahmed E. Eljaali, *Sudan Arbitration Law 2005 and Need for Reform.* (AL-Daar AL-Sudania, 2013) 113

International arbitration is perceived to be "a private proceeding with public importance."[30] The tribunal is permitted to perform all that a civil court can, subject to the public policy limitation, which orders that, as mentioned above, certain categories of dispute cannot be settled by arbitration and that only the national courts will have power.[31] It is essential to state that the term "arbitrability" can determine various elements[32] (i) if there is an arbitration agreement, (ii) if the dispute is exceeding the scope of the arbitration agreement, and, (iii) if the subject matter of the dispute is arbitrable.[33]

National laws frequently restricted or limited the issues which can be settled by arbitration.[34] For example, in Sudan, the state entities may not be permitted to enter into arbitration agreements at all unless authorised by the state to do so. In Sudanese law, the issue of arbitrability of disputes is not ruled by enactment but by case law. This is because the only source of arbitrability is held in article 3(3) of the Arbitration Act 2016 which states that there *"...may not be arbitration in matters which may not [involve] reconciliation,"* while not providing any non-arbitrable matters. The various Sudanese arbitration laws do not determine which law should deal with the question of arbitrability. Moreover, sections 42(1)(d) (e)(f) and 48(e)[35] of the Arbitration Act 2016 allow the courts to refuse an award if the dispute was not appropriate for settlement by arbitration or if the award violates the public policy or morals of Sudan, so giving the discretion on the issue of arbitrability to the courts[36]. It is relevant to mention here that arbitrability and public policy are two separate grounds under the sections described above. However, arbitrability ultimately gets associated with public policy as it may not be in the public interest that several types of matter, such as criminal circumstances, family law etc. should be resolved by arbitration, as they affect issues such as civil security, constitution, social purposes etc.[37]

The Sudanese court system should maintain that in international arbitration disputes national courts may balance different issues against each other: the public interest of the state's laws

[30] Redfern and Hunter (n8) 309
[31] Azhary A. Sharshab, *Authenticity of the Foreign Judgment and its Enforcement Methods.* (AL Daar AL Sudaniya, 2013) 109
[32] *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd*, AIR 2011 SC 2507
[33] Ibid
[34] Fouchard Gaillard Goldman, On International Commercial Arbitration, Para-533; Kirry, 'Arbitrability: Current Trends in Europe', 12 Arbitration International 373 (1996) 381 et seq
[35] Article 47(D) of the Arbitration Act 2016, which provides that:
"Recognition or enforcement the award, or part of it, is not contrary to public order in Sudan. The court shall execute what is compatible with public order while abstaining the part that contradicts with public order."
[36] Ahmed E. Eljaali (n29) 270-274
[37] Patrick M. Baron and Stefan Linegr (n20) 290

on the non-arbitrable subject matters, and the country's benefits in promoting arbitration in international trade[38]. In particular, Sudan wishes to promote itself as a venue for transnational arbitration, to decrease of the burden on overloaded courts, and to uphold the fulfilment of the standards of autonomy of contracts in international trade and business dealings by upholding respect for the transnational community, and the accessibility to judicial control of awards which offend public policy.[39] The interests of promoting transnational trade have proven valuable for the courts to treat certain types of disputes as arbitrable.[40] Therefore, the national court's attitude towards arbitration may play a significant role.[41] There are the subjects of dispute which are non-arbitrable according to the laws of some countries but which are so in others.

Each state decides which matters may or not be resolved by arbitration by referring to its own political, social, and economic policy.[42] In Sudan, and some other Arab states, for example, contracts between a foreign corporation and its local agents are given special protection by the law, and to reinforce this protection any dispute arising out of such agreements may be resolved only by the local courts.[43] It is clear that the Sudanese legislators restricted arbitrability, especially in respect of disputes involving state entities. The reason for such restriction is that this is the only way in which Sudan can hold control over foreign trade and investment where more economically powerful traders may have an unfair advantage.

The decision of the Sudanese Court of Appeal[44] confirmed the nullity of the award, which violates public policy rules. According to these:

> "*...It is not permitted for the judge to implement the judgment if he considers that it is inadmissible to resort to arbitration to settle the dispute, or that enforcement of the award violates …. public policy…" [45]*

[38] Ahmed A. Bin Nagi AL Salahi (n19) 209

[39] Azhary A. Sharshab (n26) 78

[40] Paulsson, *The Idea of Arbitration*. (Oxford, University Press, 2013) 444-448

[41] *Kulukundis Shipping Co. v. Amtorg Trading Corp.,* 126 F.2d 978, 983-84 (2d Cir. 1942). Historically, the US courts have reacted with hostility to arbitration agreements, fearing that their jurisdiction was being ousted.

[42] Nigel Blackaby with Redfern and Hunter on *International Arbitration.* (Oxford University Press, 2015) 111

[43] Ibid, /see also United States. The arbitration of certain types of disputes that engages in public policy appears to be under legislative attack, (Arbitration Fairness Act 2015) and invalidated any pre-dispute arbitration clause in the relation to employment consumer, antitrust and civil right disputes on the ground that the weaker of the parties in reality has little or no meaningful choice as to whether to select arbitration.

[44] Case No.AM 1019 of 23p, issued at 09/11/1994 session, (unpublished circular).

[45] Ibid 76

However, the parties are free to choose which provisions the arbitration tribunal should implement, although this right of choice should not extend to avoiding the mandatory rules governing the matter of arbitrability[46].

Furthermore, under article V (2)(a) of New York Convention, recognition and enforcement of an arbitral award may also be declined if the competent authority in the country where recognition and enforcement of the award find that "*the subject matter of the dispute is not capable of settlement by arbitration under the law of that country*."[47] In line with this principle, the Sudanese Arbitration Acts of 2005 and 2016, maintain that recognition and enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration or if it would be contrary to public policy to recognise or enforce the award. Article 48 of the Arbitration Act 2016 provides that;

> *"c. The award or order is not inconsistent with an award or order, which has been previously passed by Sudanese courts in the same substantive issue of the dispute;*
>
> *d. The award does not include what is inconsistent with public order, or morals in Sudan.*
>
> *e. The country where the award is issued and requested to be executed is executing Sudanese court judgements, centres and tribunal awards in its jurisdiction, or by the judgments conventions ratified by Sudan."*[48]

However, national legislators are permitted to regulate which disputes are arbitrable and which are not. That may be explicitly done where substantive rules reject the arbitrability of certain disputes. The exclusion may also arise from the limited jurisdiction of arbitral tribunals or national courts[49]. The legislators and courts in each country must balance the national importance of reserving certain matters of public interest to the courts against the more general public interest in providing people with the freedom to determine their private affairs as they see appropriate.[50]

[46] AL Khair Gashi, the difference between Arbitration Methods for Settlement of International Disputes, (1st Edition, University Institute for Studies, Publication and Distribution, 1999) 306

[47] Article V (2) (a) New York Convention 1958

[48] Article 3 Arbitration Act 2016

[49] Redfern and Hunter (n25) 111

[50] Ibid

On the other hand, arbitrators are bound to respect the public policy rules of any given country were relevant and applicable.[51] Compliance with this duty is guaranteed through court scrutiny of the final award under the public policy exception, both at the stage of enforcement and in applications for the award to be set aside made to courts at the place of arbitration.[52]

Under the Sudanese Arbitration Act 2016 and the Civil Procedure Code 1983, two different approaches can be distinguished. The first depends mainly on functional criteria that the parties have the right to settle the dispute. However, at the same time, they have the right to exclude arbitrability of certain disputes expressly. For example, the merits of the dispute were included in Article 3 (3) of Arbitration Act 2016: the text provides that there:

> *"...may not be arbitration in matters which may not be open to reconciliation, and it is not a valid agreement to arbitrate, but who has the capacity to act in the right in the dispute."*[53]

The Sudanese arbitration law provides that the matters which cannot be subject to reconciliation must not be arbitrable. The questions raised are: why do the arbitration laws of Sudan use conciliation as the measure of arbitrability, or whether the use of the capability for conciliation as a critical factor of the arbitrability question implies a different interpretation to the fact that the disputes that show the public interest of the country cannot be arbitrated?

The Sudanese arbitration laws provide a provision restricting the subject matter of the arbitration agreement to be valid. The violation of such a requirement may result in the arbitration agreement being invalid, and the arbitral award thus is set aside[54]. However, the arbitration laws of Sudan contain many outdated provisions that are influenced by the heritage of the past. It is affected by the Sharia principle of arbitration.[55] These measurements show a level of ambiguity, and it appears that Sudan applies the capability for conciliation as

---

[51] Marc Blessing, *'Mandatory Rules of Law versus Party Autonomy in International Arbitration*' (Kluwer Law International, 1997) 23. See for example ICC Award No .8626 of May 1996, (published in French by J. D. Int. 1999) 1073, where an arbitral tribunal sitting in Geneva applied Article 85 of the EC Rome Treaty to invalidate a noncompetition clause in a contract governed by the laws of the State of New York as chosen by the parties.

[52] H. Arfazadeh, 'L'ordre public du fond et l'annulation des sentences arbitrales internationals en Suisse' (1995); see, for example, the widely discussed London Court of Appeal's decision in *Soleimany v Soleimany* (1999] QB 785, in (1999) 24a YB Comm. Arb. 329, esp. at p. 341, Para. 32

[53] Arbitration Act 2016, Art 3(3)

[54] Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries,* (3rd Edition, London, Kluwer Law International' 2011) 511

[55] Mohamed M. Adam, *Enforcement of Foreign Judgments in the Sudan.* (Dr Adam & Associates, May 2015) 167

a deciding basis of arbitrability in order to decide that the law follows the approach of Islamic jurisprudential schools in regards to that aspect of arbitrability[56].

Therefore, it would be more useful if Sudan amends this text without the use of the capability for conciliation as a definitive determinant of arbitrability. It may be sufficient to require that the subject matter of the dispute shall be arbitrable, as in Article II (2) and Article V (2) (a) of the New York Convention.

The above article also suggests the following criteria: the capacity of the parties to arrange an agreement by mentioning, "*whether they have the capacity to act in the dispute*". In the Sudanese legal system, 'a person' can be a natural person or a legal body. Such identities should have the capacity to be entitled to rights and liabilities.[57] Any person who can conclude a contract has the capacity to make an arbitration agreement. Any disability that affects the party's right to make the contract will equally affect the right to enter into an arbitration agreement.[58] A natural person requires being capable of conducting a contract to be subject to arbitration in the case of a dispute. Suppose an award is not addressed to the parties to the agreement that award may be not considered for recognition and enforcement[59]. However, none of the Sudanese Arbitration Acts stated 'incapacity' of a person as a ground for refusal of enforcement of an arbitral award.

This is also the case with article V(1)(a) of the New York Convention, and it has also been said that incapacity should also be read into Article II of the New York Convention which deals with the non-recognition of arbitration agreements if they are "*null and void, inoperative or incapable of being performed*."[60]

Article 42 (1)(b) of the Arbitration Act 2016 deems that the arbitration agreement is invalid if, at the time of agreeing, one of the parties to the arbitration agreement was under some incapacity according to the law that governs capacity. However, a distinction has to be drawn between future and existing disputes.[61] In order to refer an existing dispute to arbitration, the

[56] Ibid

[57] See Arbitration Act 2005, Arts 40 and 42: Article 157 of the Civil Procedure Code 1983: "a person is capable of having rights and duties within the civil order".

[58] Sundra Rjoo, *Law, Practice and Procedure of Arbitration.* (2nd edn, Lexis Nexis, 2017) 133

[59] Fawzi Mahmoud Sarni - International Commercial Arbitration, (5th Edition, Dar AL Thaghafa Library for publication and Distribution, 2013) 303

[60] See Article V(1)(a) the New York Convention 1958

[61] *Hatton v Boyle* (1858) 3 H & N 500; *Robertson v Hatton* (1857) 26 1.) Ex 293; *X Jute Mills Co Ltd r Firm Binil* All 176

other parties must agree expressly or impliedly by their conduct to arbitrate the present dispute.[62]

It is essential to consider the capacity of the parties to an arbitration agreement mainly when dealing with foreign entities whose legal status is governed by the law of their home jurisdiction[63] as there may be differences between Sudanese law and that of the overseas state regarding the definition of incapacity.[64]

The second approach can usually be found in civil law and arbitration laws. This approach is based on the idea of arbitrability being defined by the national statute. This approach may be found in Article 138 of the Civil Procedure Code 1983:

> *"Where in any suit if all the parties interested agree that any matter in issue between them shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference".*[65]

Examining the Civil Code provision dealing with arbitration matters, which may be found in the Arbitration Acts 2005 and 2016, it may be assumed that the Arbitration Act followed the same procedure and conditions of the Civil Procedure Code 1983.

A fundamentally crucial difference should be considered, however between non-arbitrability and invalidity on the one hand, as well as non-arbitrability and illegality on the other. Despite these differences, they may indicate quite similar results regarding an arbitration agreement.[66] It is of significance for the parties and arbitrators to consider the distinctions between three notions to protect the efficacy of their arbitration agreement from any potential ground that could prevent an award from being recognised or enforced, whether on the grounds of non-arbitrability, illegality, or invalidity.

An arbitration agreement might be invalid for several reasons: the law chosen by the parties to govern their agreement, the lack of consent of the parties, the law of the country where the place of arbitration is located, bribery or fraud or improper arbitral proceedings.[67]

---

[62] *Antram v Chace* (1812) 15 East 209; *Thomas v Atherton* (1878) 10 ChD 185

[63] Ahmed M. *Sheta* (n17) 504

[64] Sundra Rjoo (n46) 134

[65] Civil Procedure Code 1983 Art 138

[66] Homayoo N Arfazadeh, 'Arbitrability under the New York Convention: the Lex Fori Revisited Controvers' (2001) AIJ Volume 17 Number 174

[67] Homayoo N Arfazadeh, 'Arbitrability under the New York Convention: the Lex Fori Revisited Controvers' Arbitrational International Journal (2001) Volume 17, Number 174

Alternatively, a party may simply claim that he never entered into the agreement in the first place, which would indicate that the agreement is not binding or enforceable upon the parties. However, in the case of business agreements which are normally in writing, this option will not be available[68]. Moreover, the rules of the validity of arbitration agreements are generally derived from applicable principles of contract formation and substantive validity[69]. In contrast, rules of non-arbitrability are based on specific statutory enactments explicitly directed on arbitration agreements regarding specific categories of dispute.

An arbitration clause would be deemed illegal if the parties meant to use arbitration to perform unlawful conduct, such as committing terrorist acts,[70] for example. Arbitration is a consensual process, making it vital that any dispute referred to arbitration falls within the scope of the agreement conducted by the party's consent. A contractual intention towards arbitration must be expressed in a document signed by both the parties, whether in the form of the arbitration agreement or otherwise. It is, therefore, relevant here to explain that the intention to refer a dispute to arbitration may also be expressed using a reference to a separate document in which the arbitration clause is contained**.**[71]

Circumstances in which the allegation will directly impeach the arbitration agreement on the grounds of an allegation that the contract containing an arbitration clause was void *ab initio* for illegality, never had any consideration, was to be treated as having never existed under the agreement by the parties.[72] There is no unified approach as to whether an arbitration clause may cover allegations of criminal activity. For instance, in *Interprods Limited International Limited, v. De La Rue International Limited*,[73] the Commercial Court held that:

> *"...it would be seriously restricted be the ambit of arbitration clauses, ... the allegation of criminal conduct to be sufficient to deprive the arbitral tribunal of jurisdiction to determine contractual rights and obligations in light of that criminal conduct..."* [74]

[68] Fath El Rahman El Sheikh, *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arbitrations,* (Cambridge University Press, 2009) 349

[69] Sundra Rjoo (n58) 710

[70] Homayoo N Arfazadeh, (n67)

[71] A J van den Berg, *Final Award*, CAM Case No, 7211, 24 September 2013 in ed, Yearbook Commercial Arbitration Votote XXXIX (2014) 275-276

[72] Nigel Blackaby, Alan Redfern, and Martin Hunter, (n15) 312

[73] *Interprods Limited International Limited, v. De La Rue International Limited* 2014 EWHC68 (Comm) at (7)

[74] [2014] EWHC 68

An argument has been raised by scholars[75] on the non-arbitrable issues related to personal statutes, due to the importance of such matters in social life for both the individual and society and due to the consequences resulting from submission to the judiciary regarding the risk of revealing the privacy of the family and exposing minors to appear before courts [76]. Besides, there is the potential element of violence in disputes of this kind, which in turn, hinders resolving them, thus affecting the stability of personal affairs of the individual. However, the Court of Cassation[77] has defined a person's status as:

> *"…a number of natural and familial characteristics that distinguished one person from another and that the law sets upon a legal effect in his social life, as being a male or female, a husband, or a widower, divorced or a legitimate son or father sues juries or not, for being young or idiotic, insane or being of absolute capacity or restricted capacity due to one of its legal reasons*"[78]

The legal rules related to personal status are concerned with financial matters in which compromise is permitted and accordingly, arbitration is appropriate.[79] Examples of issues related to matters of personal status in which arbitration is not permitted are certain disputes related to the validity and nullity of the marriage contract, divorce and its legal conditions, marriage in prohibited situations, divorce at the instance of a wife who pays compensation, the avowal of paternity, adoption, and affiliation to family custody of the infant and its rights from its parents[80]. And matters related to capacity: guardianship, trusteeship, inheritors as to whether the individual inherits or not and matters related to nationality as a legal and political bond between the individual and its country, and matters related to voting and nomination rights for seats of both legislative and executive authorities.[81]

4.4 Arbitrability and Commercial Arbitration

Arbitrability is vital to commercial arbitration as there are matters such as fundamental moral beliefs, legal, social, religious or policies of the forum that should be considered by the

[75] Imad Al- Bushary, *The Hypothetical and Practical Notion of Public Policy*. (2nd edn, Islamic library, Riydah 2005) 442, see also Ahmed M. Sheta (n17) page 506, and Ahmed Abu Al Wafa, *Optional and Compulsory Arbitration – on Nullity of Arbitration Agreement Signed by Minor.* (2nd edn, Daar El-Fakir, 2009) 434.

[76] Ibid

[77] Case No. SD2018 M of 23n, issued at 16/2/1998 session, (unpublished circular).

[78] ibid 109

[79] Ahmed Abu Al Wafa, Optional *and Compulsory Arbitration – on Nullity of Arbitration Agreement Signed by Minor.* (2nd edn, Daar El-Fakir, 2009) 69.

[80] Ahmed M. Sheta (n75)

[81] Ibid

arbitral tribunal[82].Therefore, the place of performance andpublic policy of the applicablelaw all must be considered by the arbitrators.

When introducing the issue of arbitrability in transnational commercial arbitration it is necessary to focus on the law applicable to questions of arbitrability (the limitations imposed in different countries), and whether arbitration tribunals have the right and duty to deal with the issue of arbitrability on their initiative.[83] That does not mean the existence of any internationally accepted criteria to determine what matters are arbitrable. It merely stands for a procedure, which determines settlement by arbitration. [84] The issue of arbitrability may be determined in different ways:

(a) the arbitral tribunal may determine it as a preliminary point; or

(b) a party may apply to the courts of the seat of the arbitration for an injunction or declaration to the effect that the subject matter of the dispute is not capable of settlement by arbitration;[85] or, in commercial arbitration, the law governing the arbitrability of a dispute may depend on where, and at what stage of the proceedings the question arises.[86]

(c) Tribunals may apply different criteria from courts in determining this issue.[87]

In considering whether a dispute is arbitrable or not, a Second Circuit Court[88] of the United States stated that the court must first decide whether the parties agreed to arbitrate and if so, whether the scope of that agreement encompassed the claims, which are the subject matter of arbitrability.[89] The drafters of the UNCITRAL Model Law, however, failed to reach any consensus on the definition of "arbitrability".[90] Issues of arbitrability are usually determined

[82] Born G, *International Commercial Arbitration,* (3d edition, Kluwer international Law, 2009) 302

[83] Julian D. M. Lew *Applicable Law in International Commercial Arbitration- Arbitrarily.* (Oceana Publications, 1978) 409; Redfern and Hunter (n15) 304

[84] Personal Interview with Professor Charles Chatterjee –. Feedback regarding New York Convention article V(1)(a) and (2), London, May 2017

[85] Redfern and Hunter, (n40) 306

[86] Ramón Mullerat Balmañá: *Arbitration and Competition Law: A Basic Summary of The Debate.* (Periodo de Publicación Recogido, 2011) 75-102

[87] Charles Chatterjee (n66)

[88] *Paint Webber Inc. v Mohammad S. Elabi* (1996) 87 F 3d

[89] Sundra Rjoo (n40) 163

[90] Ramón Mullerat Balmañá: *Arbitration and Competition Law: A Basic Summary of The Debate*. Periodo de Publicación Recogido. (2011) 75-102

by reference to the law of the seat or the law governing the arbitral agreement if this is different.

According to Article II (1) of the New York Convention, the issue of arbitrability must satisfy three conditions: there must be an agreement in writing; there must be a defined legal relationship, and the subject matter of the dispute must be capable of settlement by arbitration.[91] However, in the case of *Baxter International v Abbott Laboratories,*[92] the US court considered that the arbitral tribunal should consider the public interest in the enforcement of any award, and states that:

> *"Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of antitrust laws has been addressed. The New York Convention reserves to each signatory country the right to refuse enforcement of an award where the 'recognition or enforcement of the award would be contrary to a public policy of the country."*[93]

International conventions also have issues of arbitrability. The New York Convention has two articles related to arbitrability; there are article II (I) and II (3) and Article V (1) (a) and (2).[94]

The issue of whether a dispute is domestic or transnational is also relevant to the question of arbitrability. According to the US practice, the issue of arbitrability should be interpreted broadly in an international context rather than a domestic one, as what constitutes a defined legal relationship differs from state to state.[95] The concerns of the international community are usually considered, with respect for the capacities of foreign and transitional tribunals and sensitivity to the necessity of the international commercial system.[96]

4.5 Arbitrability, Public Policy and Mandatory Rules of Law in the Sudanese Arbitration System

[91] Sundra Rjoo (n40) 163, 171

[92] *Baxter International v. Abbott Laboratories* 315 F.3d163 [2004] (the United States, Court of Appeals, Seventh Circuit. Decided: January 16, 2003)

[93] Ibid / page203

[94] See New York Convention article II section (1, 3), '' The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.''

[95] Van den Berg, *The New York Arbitration Convention of 1958*, (Kluwer Law International, 2013) 152-154

[96] Ibid

To give a single definition of public policy is difficult. In as much as public policy is a recognised principle, a comprehensive definition has never been proposed[97]. However, its significant operation is in the area of choice of law and the area of recognition and enforcement of foreign judgments.[98] That said, law and order in the state are meant to set ethics and higher values which shape the identity and features of the ideal human life and its efforts towards achieving its goals whether political, social, and economic or ethical.[99] It imposes itself on the various legal relationships in the state in the form of mandatory legal rules that control this relation, and nullifies any contractual relations or otherwise that violate these rules.

Mandatory rules of law, like public policy, can impede arbitrability if they are used as a defence mechanism to avoid arbitration or recognition and enforcement of an award.[100] They compete with default rules which are "*those government-created rights and duties that govern the system of justice unless the parties contract out of them.*"[101] Hence, contrary to default rules, these rules arise "*outside the contract, apply regardless of what the parties agree to, and are typically designed to protect public interests that the state will not allow the parties to waive."* [102] A distinction is made between mandatory rules of public policy on the one hand, and mandatory rules concerning private interests on the other.

Examples of mandatory rules of law are competition laws, currency controls, environmental protection laws, measures regarding embargo, blockade or boycott; [103] or laws falling in the somewhat different category of legislation designed to protect parties presumed to be in an inferior risky position, such as wage earners or commercial agents[104].

However, the Sudanese courts might refuse to enforce an arbitral award even if the submission to arbitration was lawful under its jurisdiction, on the grounds that the arbitral tribunal overrode its jurisdiction. Also, Sudanese courts may refuse to enforce a foreign

[97] Professor Charles Chatterjee (n89)

[98] P.B. Carter, *The Role of Public Policy in English Private International Law.* Cambridge University Press (1993) ICLQ, 1

[99] George A. Bennann, 'Introduction: Mandatory Rules of Law in International Arbitration', American Review of International Arbitration, (2007) Vol. 18 I- 2

[100] Ahmed M. Sheta, (n35) 295

[101] Stephen J. Ware, 'Delil Ult Rules from Mandatory Rules: Privatizing Law Through Arbitration.' Minnesota Law Review, Vol 83, [1999] 703, 706

[102] Donald F. Donavan and Alexander K.A. Greenawalt, '*Mandatory* Rules', in Loukas A. Mistelis & Julian D. M. Lew (eds) *Pervasive Problems in International Arbitration*. (Kluwer Law International, 2006) 13.

[103] ibid

[104] Steven H. Reisberg (n21) 319

arbitral award on the grounds of public policy. That is so because there are several public policies to be considered owing to the multinational nature of commercial arbitration.

The Sudanese constitution provides that specific laws, identified as public policy include Islamic jurisprudence, constitutional law, civil law, criminal law, laws that organise personal family's status laws, laws forming the judicial courts, mandatory rules of law and regulation related to the national economic system such as remuneration and national currencies, cannot be submitted to arbitration.[105] This is also a list of what would be considered against Sudan's public policy in the case of the enforcement of foreign arbitral awards. For example, article 47 of the Arbitration Act 2016 states that a requirement for enforcement of an arbitral award is that:

> *"... the award, or part of it, is not contrary to public order in Sudan. The court shall execute what is compatible with public order while abstaining the part contradicts with public order."* [106]

If public order requires the elimination of applicable foreign law, the protection of international solidarity may require the application of foreign law to protect international public policy, as consistent with the interests of international trade.[107] According to Sudanese law, the subject of public policy generally is referred to as public order, or '*'Al-nizam Al-aam''* in Arabic. The description of public order, in general, indicates a more limited concept than public policy does. The public policy covers issues of general interest, while public order only refers to those linked to public policy.

The term "public order" is not clearly defined, as there is no provision in Sudanese law interpreting it, nor is there any case law on the point. The Committee on International Law Association (ILA) defined "International Public Policy" as the part of the public policy of a state, which, if violated, would prevent a party from invoking foreign law or a foreign award.[108]

The idea of public order varies from state to state, as it ranges between the concepts of national public policy to that of international public policy.[109] In contrast, internal public

[105] Fath El Rahman El Sheikh (89) 217

[106] Arbitration Act 2016, Art 47 (d)

[107] Jan Kleinheisterkamp, 'The Impact of Internationally Mandatory Laws on the Enunciability of Arbitration Agreements.' World Arbitration & Mediation Review Vol. 3, no 2, [2009] 91, 9

[108] See ILA, *Report of the Committee on International Commercial Arbitration on Public Policy* (2004) 1 TDM

[109] W de Lint, "*Police Authority in Liberal-Consent Democracies: A Case for Anti- Authoritarian Cops*." edited by Michael D. Reisig and Robert J. Kane. (The Oxford Handbook on Police and Policing, 2014) 217–237

order is supposed to protect a society's social, economic, or political interest; whereas the function of international public policy when related to international trade, aims at protecting international solidarity, which requires the state to contribute to the renewal of the unique relations between that state and other countries.[110] For example, an arbitral award based on a contract containing provisions as to 'interest' could come up against problems of public policy at the enforcement stage as under the laws of Islamic states as it is against Islamic law to award interest.[111] Under Swiss law, it is legal for personal influence to be used in obtaining a contract provided there is no actual evidence of bribery[112]. However, in Sudan, public policy matters can be categorised into specific classes: the economic order of the country, the judicial order, in the rights of individuals and Islamic moral principles.

Furthermore, The Sudanese Arbitration Act 2016 created restrictive and limited rules for the enforcement of foreign judgments, and article 206 of the Civil Procedures Act 1983 states that it may not carry out a foreign command unless it meets the following conditions:

> *"…Judgement or command should not contain any statement which would be considered to be contrary to morals and public order in Sudan…"*[113]

Also, the Article 306 section (d) of the Civil Procedures Act 1983 states that:

> *"..the judgment or order does not contain anything that violates the public order morals in Sudan; and that the state in which the judgment was issued and of whose judgment enforcement is desired accepts the enforcement of the judgments of the Sudanese courts in its territory…"*[114]

There are two separate grounds relating to the recognition and enforcement of foreign arbitral awards. Firstly, where domestic law is concerned, public order would generally grant recognition or enforcement.[115] Secondly, there may not be in existence any reciprocity of recognition and enforcement of judgement between the foreign court and the courts in Sudan. Thus, sometimes the courts will refuse recognition and enforcement of an arbitral award. However, under Sudanese law, foreign awards would be recognised and enforced if they are not contrary to the rules of the Islamic Shari'a and the appropriate general laws in Sudanese

[110] Elias, N. *The Civilizing Process.* (2nd ed, Wiley-Blackwell, 2000) 178

[111] Samir Salah, 'The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East', Journal Article Vol. 1, No. 1 (Nov 1985) 19-31

[112] Ibid

[113] Article 206 (b)(c) the Civil Procedures Code 1983

[114] Article 306 section (d) the Civil Procedures Act 1983

[115] Azhary A.Sharshab (n38) 57

regulation.[116] The status of Shari'a in the legal system has always been an essential matter in Sudan.[117] Muslims' personal matters concerning marriage, divorce, guardianship, inheritance, are adjudicated by Shari'a courts by Islamic law (Shari'a). Therefore, Islamic moral principles are one of the most significant public policy matters in Sudan. Hence, a breach of the Shari'a is considered to be a breach of public policy in most Arab states, particularly those countries, and in particular, Sudan that holds Islamic jurisprudence as the fundamental source of law. However, the question arises as to whether all Shari'a principles are considered as part of public policy issues. It has been said that important rules of the Shari'a are regarded as public policy. A rule is considered to be vital if it is stipulated in the Quran. Therefore, it is possible to say that the attitude of Sudanese Arbitration Law emphasises that the results of arbitral awards must not conflict with Islamic Jurisprudence. Article 48 (d) of the Arbitration Act 2016 stipulated that arbitral awards should not be contrary to Islamic jurisprudence and if so, must be rejected for enforcement in Sudan.

It is an essential limitation to the use of public policy rule in the New York Convention that the introductory sentence of Article V (2) uses the word "may" and therefore allows the court discretion to determine and apply the public policy exception.[118] However, in reality, the word "may" gives discretionary power to the domestic courts of signatory states, and there has been a wide range of approaches as to the role of the court in determining public policy.[119] Courts in other countries have also recognised that, in applying their policy to the Convention awards, they should give it an international, and not an internal dimension. In India, for example, the Supreme Court took this position in *Renusagar Power Co. Ltd (India) v General Electric Co (US).* .[120] The question could be whether the narrower concept of public policy as applied in the field of public policy in international law should be applied or the broader concept of public policy as applied in the field of municipal law. In the case of the *Whittemore Overseas Co.Inc. v Societe Generale*[121] the Court held that:

> *"…the narrower view should prevail, and that enforcement would be refused on the public ground if such enforcement would be contrary to (i)*

[116] Ahmed Abu Al Wafa, (n55)

[117] Ahmed M. Sheta (n35) 123

[118] Van den Berg. (n77) 158

[119] Ibid

[120] *Renusagar Power Co.Ltd (India) v General Electric Co. (US)* (1995) XXYBCA681

[121] The discussion of *Whittemore Overseas Co.Inc. v Souciete Generale de I Iindustrie Dupapier (RAKATA)* 508F. (2d.1974) at Redfern and Hunter (n58) 643

fundamental policy of India law, or (ii) the interests of India; or (iii) justice or morality…".[122]

Moreover, the Court also held that the Convention's 'public policy' defence should be constructed narrowly and that enforcement of foreign arbitral awards should be denied on this basis only where enforcement would violate the forum state's most basic notion of morality and justice.[123]

However, when approaching the resolution of an arbitration dispute, it is essential to bear in mind the distinction between domestic and international public policies. The courts normally perceive international public policy as less important than national public policy to the extent that the former can be said to exist.[124] Domestic public policies serve fundamental values of the national community contained.[125] In contrast, the international public policy contains vital interests and internationally accepted norms, adopted by the UN Security Council resolutions or by other agencies.

However, it is essential to realise that the issue of whether a specific transnational dispute is arbitrable or not will be a question of the applicable national law and nature of the internationality of the dispute[126]. Generally, transnational arbitration agreements are also required to satisfy the conditions of arbitrability.

4.6 The Notion of Sharia Public Policy

Sharia law, which was mentioned in section 2.5 gives rise to a public policy of its own. However, there is no specific definition in Sharia law itself. Dr Basma I. Abdelgafar[127] identified Sharia public policy as follows.

> *"Public policy in Islam is grounded in the philosophical framework of 'maqs|id al-sharĬ¢ah', which encourages an integrated and purposeful reading of the Revealed and unrevealed word to understand, interpret and operationalize sources of the sharia (the Qur'an and Sunnah) and knowledge that is discovered by succeeding generations of scholars and practitioners."* [128]

[122] Ibid

[123] Ibid 108

[124] Ahmed Abu Al Wafer (n95) 315

[125] Homayoo N Arfazadeh (n53) 434

[126] Ibid

[127] Basma I. Abdelgafar*, Public Policy Beyond Traditional Jurisprudence A Maqasid Approach*. International Institute of Islamic Thought, (2018) 33

[128] Ibid

Other scholars have defined the Islamic policy of Sharia as a set of political, social, and economic criteria that differ at various periods and which should not violate Islamic principles.[129] However, by studying some of the sources of Sharia law, one can find that they generally define Sharia public policy by placing it in three central categories. Any violation of these may amount to a breach of Sharia public policy, which may have an impact upon recognition and enforcement of the foreign arbitral award in the in Sudan.

The first category of matters is the thought of God's rights.[130] This theory is grounded in the religious meaning that "God" is the only God in the world and that all of humanity will believe Him alone and do not compare Him with other God. This category relates to non-Muslim religious rituals, such as Christians, Jews, or the faith of any other religion, which is forbidden in particular Islamic countries, for instance, Saudi Arabia and Iran, and considered a blatant breach of Sharia public policy[131]. However, Sudan has reduced this attitude, and many Churches have been established to allow non-Muslims to practices their beliefs freely. This is accepted under the provision of the constitution,[132] freedom of religion accepted throughout the country. Some of Sharia scholars also accept the general rule that the Islamic state protects the rights of non-Muslims (under certain circumstances) who are resident there. However, this category of Sharia public policy does not appear to be closely related to contractual relationships or civil and commercial activities, such as arbitration agreements or awards[133].

The second category of subjects of public policy in Sharia is connected to illegal and forbidden activities under Sharia law[134] and is linked to its mandatory and non-mandatory rules. This category of issues of Sharia public policy is similar to arbitration practice in Sudan, as discussed in the matter of *Riba* (loan interest), and may also operate as a barrier to the recognition of foreign arbitral awards under the New York Convention in Sudan. This may be because of the Muslim belief that Sharia principles are the supreme rules[135]. Thus,

---

[129] Imad Al- Bushary, *The Hypothetical and Practical Notion of Public Policy*. (2nd edn, Islamic library, Riydah. 2005) 19

[130] Basma I. Abdelgafar (n8) 48

[131] Ibid

[132] article 6 (1) of Sudan Constitution provides that '*The State shall respect the following religious rights:- a. worship or assembly in connection with any religion or belief and to establish and maintain places for these purposes*'

[133] Azemi Atiya, Kuwaiti Arbitration Law, Study of Internal Arbitration Law Rules under Kuwaiti Procedures Law Cairo Daar AL Nhada AL - Arabia (2012) 145

[134] Abdullah Mahdi, '*Public Policy in the Islamic World.*' (1st edn, Dar AL-Fikr, 2009) 12

[135] Imad Al- Bushary (n129) 22

any violation of this religious law will invoke the application of Sharia public policy as an argument. It varies from the practice in different legal traditions where a break of mandatory rules does not fundamentally violate state public policy[136].

The Swiss courts confirmed that public policy does not significantly violate foreign awards when it does not comply with the mandatory rules of Swiss law.[137] Also, the German Court of Appeals noted,[138] after referring to the concept of separation between domestic and international public policy, that in the case of foreign awards, not all violations of mandatory rules of German law create a breach of German public policy, since the latter only covers critical cases.[139] Many authors and court practices recognise the notion of easing the mandatory rules approach concerning international commercial arbitration in their decisions on foreign arbitral awards.

Nevertheless, in Islamic law, there are many mandatory limitations or mandatory provisions that are related to those found in other legal systems too[140]. For instance, the Quran prohibits Muslims from eating pork or drinking spirits, and therefore, any agreement that involves pigs or alcohol may break Sharia's public policy. Besides, the Quran forbids sexual relations between unmarried adults and also prohibits sexual relationships between men. Consequently, all sexual relations of this nature will violate the public policy of the Sharia.

The same applies to *Riba*, (interest on the loan); *Riba* is a fundamental basis for invaliding a contract in Islamic law. It is banned under the mandatory terms of the Quran, and therefore any contract that includes (*Riba)* violates the general policy of Sharia[141]. Nevertheless, this category of Sharia policy effect has received different improvements in the laws of some Islamic countries, particularly the Gulf Cooperation Council States and is fully practised only in the Kingdom of Saudi Arabia[142]. For example, the current trade law of the Gulf Cooperation Council States is now applied to the (*Riba)* issue. This is a strict violation of the

[136] Basma I. Abdelgafar (130) 48-53
[137] *International Maritime M SA v Rusain and Vecichi* (1999) Switzerland Supreme Court 1998 XXII YBBA at 601.
[138] *US Firm P v. German Firm F*, (1977) German Court of Appeal, published in Y.B. Comm. Arb. II (1977) p. 241 (Germany No 11)
[139] ibid
[140] Azemi Atiya,(n133)213
[141] Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration', 28 Loy. L.A. Int'l & Comp. L. (2006) 216
[142] Ibid

public policy of Sharia mandatory provisions of the Quran forbidding (*Riba)* as a "loan interest in the commercial circumstances".[143]

The third category of Sharia public policy relates to the general notion of public interest in the Islamic community.[144] The public policy of Sharia is described in this category as the basic principles of community - economic, religious, political, and moral - that not everyone should disrupt the spirit of Sharia law[145]. Sharia public policy in this category relies on the philosophical concepts described a life that is obtained from the terms of the Quran and Sunnah.[146] This definition of public policy of Sharia is very similar to the general concept of public policy in the various legal systems.

However, the three categories of issues mentioned above do not indicate a conflict in understanding the public policy of Sharia; but they apply as the basis from which to understand its general concepts[147]. The second category of issues associated with mandatory prohibitions in Islamic law may be the Sharia public policy category that has the most potential to influence arbitration agreements and the recognition and enforcement of the foreign arbitral awards in the Islamic legal system states. However, the influence of Sharia in Sudan differs from the strict form used by Saudi Arabia.

4.7 The Difference between Domestic and International Arbitrability

The New York Convention does not distinguish between domestic and international arbitrability for example Article V (2) (a)[148] applies the issue of arbitrability to the national law of the country where enforcement is requested. Consequently, it was generally accepted that the Contracting States had complete autonomy to settle disputes which could not be resolved by arbitration[149].

[143] The Quran, verse 2:275 stipulates that “Those who swallow usury will not rise, except as someone driven mad by Satan's touch.” That is because they say, “Commerce is like usury.” But God has permitted commerce, and has forbidden usury. Whoever, on receiving advice from his Lord, refrains, may keep his past earnings, and his case rests with God. But whoever resumes—these are the dwellers of the Fire, wherein they will abide forever”.
[144] Basma I. Abdelgafar (n8) 56
[145] ibid
[146] Ahmed Abu Al Wafer, (n103) 333
[147] Faisal Kutty (n141) 214
[148] Van den Berg, *The New York Arbitration Convention of 1958*. Kluwer Law International (2013) 152-154
[149] Born G*, International Commercial Arbitration,* (3d edn, Kluwer International Law, 2009) 210

However, there is a recent growing tendency to differentiate between national and international arbitrability in order to narrow the scope of the latter.[150] This indicates that what national law regards as non-arbitrable concerning domestic arbitration should not be related to international arbitration or the recognition or enforcement of arbitral awards.[151] Consequently, the enforcement courts may interpret the restrictions required by national law on arbitrability even if the arbitration relates to international issues.[152] The reason behind this distinction is that the requirements of international commerce can differ from those of national trade needs.

These factors will need to strike a balance between the national importance of maintaining certain matters to be dealt with by the judiciary, and the general public interest in developing international commerce and prosperity through an efficient dispute settlement method.[153] These considerations have resulted in the scope of arbitrability in the context of international arbitration being broader than in the merely domestic setting.[154]

The US court held that the issue of arbitration would be defined more extensively in an international context than in its national context. The court stated:

> '*That concerns of the international community, regard for the capacities of the foreign and transnational tribunal, and sensitivity to the need of the international commercial system for predictability in the determination of the disputes require that we enforce the parties agreement, even assuming that a contrary result would be expected in a domestic context'.*[155]

By contrast, the Cairo Court of Cassation declared a distinction between the cases in which the subject of the arbitration agreement relates to property in the Arab Republic of Egypt.[156] However, the court decided that the dispute was not connected to the public interest. In this case, the dispute related to a sales agreement regarding certain property located in Cairo. The award debtor neglected in transferring the property's ownership according to the enforcement period agreed upon by both parties in the purchase contract. The dispute was settled

[150] George A. Bennann (n80) 201
[151] Stavros L Brekoulakis (n12) 189-193
[152] G Born (n41) 409
[153] Alan and Martin Hunter, *Law and Practice of International Commercial Arbitration*, (Sweet & Maxwell, 1991) 209
[154] Van den Berg. (n77) 149
[155] *Mitsubishi Motors Corporation v Soler Chrysler Plymouth Inc*. 473 US 614, 105 S.Ct 3346 (1985), (the US, The Supreme Court July 2, 1985
[156] Appeal No3988 – 1968 J issued from the commercial and civil circuits of Court of Cassation Egypt, on 8/5/1999 and its unpublished judgement

according to the arbitration clause in the main contract, and the arbitral award was rendered in the claimant's interest, which ended the contract and refunded the costs paid by the applicant.

However, the courts of the first instance dismissed the award based on Articles 10 and 28 of the Civil Code of 1949.[157] This article determines the general policy of the Arab Republic of Egypt. The courts of the first instance in Cairo held that "the distribution of wealth and the rules of private ownership are matters of public policy and hence are not subject to arbitration in Egypt."[158] However, the Court of Cassation overrode the decisions of the courts of the first instance and set a new principle in this respect. The court stated that although the characteristics principle was arbitrable on the ground of public policy, the arbitral award, in this case, linked to a dispute that showed a private interest and was not linked to the general policy of the country or the cases mentioned in Articles 10 of the Civil Code, dealing with issues such as the distribution of wealth or the rules of private ownership that create the country's public policy.

This study indicates that there will not always be a refusal to recognise and enforce an award when a dispute is deemed non-arbitrable under Sudanese law.

4.8 Traditionalism in Drafting Arbitration Clauses

It is interesting to note that the drafting of arbitration clauses in the Sudanese form, particularly in charter-parties, has acquired a clearly identifiable form. That may perhaps motivate lawyers to draft an arbitration clause in the same form. In many cases, however, the expressions already noted gave rise to clarification for judicial guidelines. The Sudanese judicial guidance on the meanings of these expressions was sought in a number of cases, particularly in *the Ministry of Finance and National Planning v. Sudanese Tractors Co. Ltd*,[159] the arbitration clause in the contract provided that:

[157] Article 28 of the Egyptian Civil Code of 1949 provides that '*The provisions of a foreign law applicable by virtue of the preceding articles shall not be applied if these provisions are contrary to public policy or morality in Egypt.'*

[158] Appeal No 3988 – 1968 J (n156)

[159] *The Sudanese Ministry of Finance and National Planning v. Sudanese Tractors Co. Ltd.* (2015) No. MA/TM/592/2015

> ‘‘…*In the event of any dispute arising between the parties, or disagreement on any of the provisions of this agreement, or any matters arising out of the contract a reference shall be made to the arbitration clause…* ’’[160]

A dispute, which arose as to whether the defendants rejected and showed an intention not to perform the contract eventually, focused on the question of whether it fell within the terms of the arbitration clause.

The Supreme Court of Justice held that:

> *"..When a contract of arbitration clause delivers without any requirement that any disagreements or dispute which may arise, in respect of or 'under the contract', shall be referred to arbitration, and the parties are at one declaring that they consent a binding contract. the clause will apply even if the dispute contains a declaration by one party that conditions have arisen, whether before or after the contract has been partially performed…"*[161]

The drafting of arbitration clauses can adversely affect the arbitrability of a dispute[162]. The term 'arising out of' was held to be more extensive in its scope than one which provides for the reference of disputes 'arising under' the contract,[163] although in *Viscount Dilhonre and Lord Salmon in Union of India v LB* v. *Aby's Rederi* [164] the court expressed difficulty in understanding the difference between the two forms of wording.

Russell on Arbitration states that the words 'arising under' were at one time given a restrictive interpretation but are now well established as having a broad meaning with disputes as to repudiation, frustration, non-disclosure, illegality rendering the contract unenforceable, failure to meeting a condition precedent and average general contribution were all held to be ‘disputes arising under' the contract.[165]

In *Fiona Trust & Holding V. Privalov*[166,] Lord Hoffman explained the reason that parties, as rational businesspersons, are likely to have intended any dispute arising out of the relationship into which they have entered, or purported to enter, to be decided by the same

---

[160] Ibid/ paragraph No. 13 of the arbitration clause between the parties

[161] Ibid 190

[162] Alan and Martin Hunter, (n153) 356

[163] Sundra Rjoo, (n71) 163. See also, Nicholas Gould: *‘Disputes Arising "Under" Or "Out of Or in Connection With A Contract,’* Mondaq (June 2017) athttp://www.mondaq.com/uk/x/48554/Building+Construction/Disputes+Arising+Under+Or+Out+Of+Or+In+Connection+With+A+Contract, accessed October 2017

[164] *Union of India v LB v. Aby's Rederi A/S* (1974) AC 797. .

[165] Sutton, Gilland Gearing, *Russell on Arbitration*, (23rd edn Sweet & Maxwell, 2007) 2-102

[166] *Fiona Trust & Holding Corp v Privalov* [2007] EWCA Civ 20 (24 January 2007)

tribunal.[167] This presumption should construe the clause unless the language makes it clear that specific questions were intended to be excluded from arbitral tribunal‘s jurisdictions.[168]

In *Fiona Trust & Holding v Perivale*[169] Longmore LJ stated:

> *“...if any businessperson did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so...”* [170]

Decisions in the case referred to suggest that the use of the expressions 'arising out of', `under,' 'arising out of and under,' `in connection with,' 'relating to' etc. have been a matter of legal controversy for a long time. Lord Brandon of Oakbrook, giving the common judgment in the House of Lords in the case of *Samick Lines Co Ltd v Owners of Antonius P. Lemos*[171], stated, *inter alia*, that:

> *'Whether the expression 'arising out of” has the narrower or, the wider meaning in any particular case must depend on the context in which it is used.*' [172]

Such a view suggests that the use of the phrase is not devoid of legal controversy and that the need to ascertain its scope in the context of every case is an invitation to a judicial determination. The question, therefore, arises whether, given the imprecision of this phrase and other similar phrases, their use should be avoided.

By process of elimination, it is possible to establish that the phrases 'in connection with' [173] or 'in relation to' should be avoided in drafting arbitration clauses in commercial contracts; as between 'arising out of and 'arising under,' the former has been regarded as broader in scope than the latter.[174] In this connection, one might consider Lord Porter's view in *Heyman v Darwins* [175] where he stated that if parties are required to have recourse to their contract, then the dispute is a dispute 'under' the contract. The use of the phrase 'arising under' might also

[167] Ibid

[168] Sundra Rajoo, (n108} 164

[169] *Fional Trust & Holding v Privalov* (n11)

[170] Ibid/ 97

[171] Lord Brandon in *Samick Lines Co Ltd v Owners of The Antonis P Lemos* HL [1985] AC 711

[172] Ibid/209

[173] Lord Brandon's opinion in *Union of E. B. Aaby's Rederi A/S v Union of India (THE "EVJE”)* [1972] 2 Lloyd's Rep. 129, and *The Antonis P. Lemos.*

[174] See *Fillite (Runcorn) Ltd. v. Aqua-Lift*, op. cit., or the opinion of Sellers, J. in *Government of Gibraltar v Kenny*, op. cit

[175] *Heyman v Darwins Limited:* HL [1942] AC 356, [1942] 1 All ER 337

avoid the subtle argument.[176] According to Lord Sumner *in Produce Brokers Limited*: a dispute does not 'arise out of a contract' but arises owing to conflicting views taken by the parties to a contract on the interpretation of specific term(s) in it.

4.9 Conclusions

The analysis presented in this chapter has shown that there are two possible reasons why the public policy of Sudan may prove a challenge to the recognition and enforcement of the foreign arbitral awards.

The first reason is that despite the fact that Sharia principles form that basis for the constitution of Sudan, and cannot be invoked even in the absence of law text or case law, the role of Islamic public policy still remains undefined in the Sudanese legal system. This argument is restricted to domestic and international commercial transactions, which are mostly related to arbitration practices. An example of this argument is set in the '*Riba'* case that limited recognition and enforcement of the foreign arbitral award in Sudan on the grounds of Sharia public policy. However, '*Riba'* is currently received and accepted in the most Middle East and Islamic countries, although it breaks the public policy of Sharia.

However, in light of the current political and legal transition towards secularisation in Sudan, this researcher suggests that the role of sharia policy should be defined in the legal system of Sudan. For example, there could have been an article in the Sudanese constitution defining what the public policy of Sharia is, and in what circumstances that might be invoked. Ignoring the question of the role of Sharia based public policy in the country's legal system provides uncertainty and does not deliver any help for the growth of international commercial arbitration in Sudan. This is also apparent, for example, by the arbitration practitioners who rated Sharia Public Policy together as one of the obstacles to recognition and enforcement of foreign arbitral awards.

The second reason is that to introduce Sudanese public policy to block recognition and the enforcement of foreign arbitral awards, owing to the lack of a legal distinction between national and international public policy may provoke controversy. It may be said that the Sudanese Act, 2016 permitted arbitral agreements in all the commercial issues other than that

[176] *India v E.B. Aaby's Rederi A/S*, op. cit., and *The Antonis P. Lemos*, op. cit

mandatory rules relating to public policy.[177] Therefore, the arbitral agreement would be deemed invalid if it relates to the mandatory rules, as previously discussed and other matters such as personal status, or disputes related to criminal matters or illegal activities.

The examination of an arbitration settlement system in force in Sudan, particularly towards arbitrability leads to certain conclusions. In order to encourage foreign investors, it should be clear that the current arbitration system in Sudan is in line with those in the Western World except where the matter at issue relates to public morality or dicta of Islamic law. Arbitration has shown to be a significant dispute settlement method and therefore, complex legislation would not assist.

However, Sudanese public policy towards arbitration, and particularly transnational commercial arbitration, should play a more significant role, by adopting a clarification that public policy is not counter to Sudanese arbitration law, particularly international arbitration. The approach should consider all issues coming within the exclusive jurisdiction of the Sudanese court. The legislator, however, should create a distinction between domestic and transnational commercial arbitrations, with the latter being more connected with public policy. It should open the doors to as many proposals as possible that would make the arbitration system ready to implement and improve the performance of the New York Convention in Sudan considering the need to reduce public policy consideration as a basis for rejecting recognition and enforcement of the foreign arbitral awards in Sudan.

The legal system must create a balance between the country's interests and the necessity for developing international trade in the country. This can be achieved by applying the approach of differentiating between domestic and international public policy in the field of international commercial arbitration. The extreme judicial application of law procedure and grounds of protecting the interests of the country is seen as damaging to arbitration proceedings and may prevent parties from choosing Sudan as a seat for arbitration. However, it is doubtful whether the jurisprudence of Sudan's courts will support a restricted understanding of public policy in order to avoid recognition and enforcement of foreign arbitral awards under Article V (2) (b) of the New York Convention 1958.

[177] D. Jackson, "Mandatory Rules and Rules of 'Order Public'", in P. North, *"Contract Conflicts, The EEC Convention on the Law Applicable to Contractual Obligations A Comparative Study*", (North Holland Publishing, 1982) 62

Chapter 5 Recognition and Enforcement of Foreign Arbitral Awards under Sudanese law

5.1 Introduction

One of the fundamental aspects of private international law in Sudan is the recognition and enforcement of foreign arbitral awards and court judgments. Owing to the rapid increase of global trade and private foreign investment, the growing trade facilities and the migration of people for political or economic reasons. There has been an increase in the frequency of litigation in foreign courts involving parties of different nationalities. Hence, the recognition and enforcement of foreign arbitral awards has become more critical in Sudan.

The issue of recognition and enforcement of foreign arbitral awards in Sudan has not been studied in depth. This may be due to the small number of disputes that are referred to the courts in Sudan. Thus, Sudan is in dire need of studies related to this subject, considering the social conditions resulting from economic openness, and the migration of people from international communities. Sudan is an economically open country, opening her doors to foreign investment corporations, which can activate the relations of private international law between individuals and businesses. Sudan has become a significant target for private and government investment in the Gulf States, especially Kuwait, Qatar, and Saudi Arabia, and numerous schemes have been in operation to develop the country economically.

Consequently, multiple investment related disputes are arising in relation to investment contracts. These may reach the courts, but orders need to be recognised and enforced. Does the other state accept this or not, and how should the law reconcile sovereignty and independence with the state that does not accept the extension of foreign jurisdiction within its territory?

This chapter critically examines the relevant laws and regulations relating to the issue of recognition and enforcement of foreign arbitral awards in Sudan. This will cover both their definition and concept, their importance and the main areas of in the process of recognition and enforcement under the Arbitration Act 2016. It also examines to what extent Sudanese law is facilitating the enforcement of foreign arbitral awards. Sudanese law did not address any distinction between domestic and foreign awards and had not provided for a definition of a foreign arbitral award. Therefore, it was found that foreign awards were subject to

challenge by the Sudanese courts and that the same judicial procedures and examinations were applied to foreign awards as those applied to domestic ones.

5.2 The Definition and Concept of the Recognition and Enforcement of Arbitral Awards

A 'foreign award' is defined as the award that was rendered outside of the territory of the state in which recognition and enforcement are sought.[1] The terms 'recognition' and 'enforcement' are distinct. An award may be recognised without being enforced.[2] An interpretation of the distinction has to be made between ''recognition'' and ''enforcement'' for a better understanding of this concept. Lew and Mistelis defined the term 'recognition' as in "national court proceedings which amount to a judicial decision mostly called an order",[3] but, if an award is enforced, that word means that it is recognised by the court which ordered it to be enforced because the court would not enforce an award unless the judiciary recognised it.

Recognition on its own is a defensive process; it will usually arise when a court is asked to grant a remedy in terms of a dispute that has been the subject of previous arbitral proceedings.[4] The party in whose favour the award was rendered will object that the dispute has already been determined. To prove this, it will seek to produce the award to the court and will ask the court to recognise it as lawful and binding upon the parties regarding the issues with which it dealt.

The use of recognition may be illustrated by considering the example of a company that is made a defendant in legal proceedings by a foreign supplier for goods sold and delivered, but allegedly not paid for.[5] Suppose that the dispute between the corporation and the foreign contractor has already been submitted to arbitration and that an award has been rendered, in which the foreign supplier's claim was dismissed. In these circumstances, the company will

[1] Yasuhei Taniguchi, '*Enforcement in Action: Theoretical and Practical Problems*,' ICCA Congress Series no 9, 589 cited in Lew et al, *Comparative International Commercial Arbitration,* Kluwer law International, Netherland, (2003) 9

[2] Ibid 10

[3] Lew J. Mistelis, and others., *Comparative International Arbitration*, (Kluwer Law International, 2003)

[4] Redfern and Hunter, *International Arbitration*, (6th edn. Sweet & Maxwell, 2015) 11-20

[5] Fath El Rahman A. El Sheikh, *The Legal Regime of Foreign Private Investment in Sudan, and Saudi Arbitration*. (1st edn, Cambridge University Press, 2009) 132

ask the court to recognise the award as a valid defence to the foreign supplier's claim.[6] The legal force and effect of the foreign award will have been recognised, but the award itself has not been enforced. It was held that an award of the Iran-Us Claims Tribunal was not enforceable under the New York Convention. However, it was recognised as an influential award issued within the authority of the tribunal.[7]

Enforcement, by contrast, occurs where a court is asked to enforce an award, and it is asked not merely to recognise the legality and effect of the award, but also to ensure that it is carried out. Enforcement goes a step further than recognition.[8] In an enforcement process the party in whose favour the award was made requests a court to guarantee that the other party is obligated to accept and enforce.[9] A court that is prepared to grant enforcement of an award will do so because it recognises the award as validly made and binding upon the parties to it, and therefore suitable for enforcement.[10] In this context, the terms 'recognition' and 'enforcement' do run together: one is a necessary part of the other.

5.3 The Importance of Recognition and Enforcement of Foreign Arbitral Awards

The principle of 'territorial sovereignty' means that an award delivered in one country cannot, in the absence of an international agreement, be enforced in another.[11] Nevertheless, English courts have enforced foreign judgments since the seventeenth century.[12] With the growth of international commerce, it believed that:

> *"...the society of nations will work better if some foreign judgments are taken to create rights which supersede the underlying cause of action, and which may be directly enforced in countries where the defendant or his assets are to be found."*[13]

The award creditor only completes the arbitral process upon successful enforcement of the awards. Enforcement of the award can become complete, but at the same time, the enforcement of awards is one of the main advantages that international commercial

[6] Redfern and Hunter (n4) 11-23

[7] As per Lord Justice Slade in *Adams v Cape Industries plc* [1990] Ch. 433 at 552

[8] Redfern and Hunter (n4) para.11-22

[9] Lew, Mistelis, Kroll (n3) 607

[10] Ibid

[11] Peter North and JJ Fawcett, *Cheshire and North's Private International Law*, (13th edn. Butterworths, 1999) 405

[12] Dicey and Morris, *The Conflicts of Laws*, (13th edn, Sweet and Maxwell, 2000) 469

[13] *Tasarruf Mevduati Sigorta Fonu v Demirel and another* [2007] EWCA Civ 799.

arbitration can have over international litigation. There would be little point in arbitration if the final award could not be enforced against the losing party'.[14]

An arbitration award extinguishes the cause of action in respect of which the arbitration proceedings were commenced.[15] It is the enforcement of an award that gives the bite and legality to arbitral proceedings. The award creditor has a legitimate expectation that the award will be enforced without delay, [16] failing which the enforcing court plays a vital role in this process. Due to a variety of approaches existing in different countries, the enforcement stage often lasts even longer than arbitration itself.

The right to enforce derives from a 'contractual undertaking to honour the award'[17] and, therefore, the non-enforcement of the award is a breach of the agreement under which the arbitration took place.[18]

5.4 Background of Recognition and Enforcement of Foreign Arbitral Awards in Sudan

In this century Sudan has witnessed the successive appearance of several procedural codes, namely, the Civil Justice Ordinance 1900, the Civil Justice Ordinance 1929, the Civil Procedure Act 1974, and the Civil Procedure Act 1983. The Civil Justice Ordinance 1900 was the first Sudanese code of civil procedure. It laid down the principles to be followed in the administration of justice in civil courts. It did not contain a provision relating to foreign arbitral awards.

The Civil Justice Ordinance 1900 was replaced and re-enacted in the form of the Civil Justice Ordinance 1929, which, in general, adopted the philosophy of the Indian Civil Procedure Code 1908. Sections 42 to 44 of the Civil Justice Ordinance 1929 dealt with the effect of the foreign judgments in Sudan.[19] When a revolutionary government came into power on 25 May 1969, it constituted a committee of different jurists, the majority of which were Egyptians to

[14] S Greenberg, C Kee, J R Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective.* (Cambridge University Press, 2011) 427, para 9.58

[15] W. Reisman, *Systems of Control in International Adjudication and Arbitration*: (Duke University Press, 1992) 324

[16] Ibid

[17] *International Bulk Shipping & Services Ltd v Minerals & Metals Trading Corp of India* [1996] 1 All ER 1017, CA (Eng.).

[18] As per Lord Justice Slade in *Adams v Cape Industries plc* [1990] Ch. 433 at 552

[19] K.D.D Henderson, *Laws of the Sudan*, (3rd edn, Cambridge University Press, 1940) 198

form and revise the Civil Justice Ordinance 1929. The committee recommended repealing it, and it was replaced by the Civil Procedure Act 1974,[20] which in some ways is derived from the Egyptian Civil Procedure Code, especially in the area of foreign judgments. The 1974 Act later became the Civil Procedure Code 1983, which adopted the same provision of the Civil Procedure Code1974. However, it inserted a new section which deals with the concept of reciprocity.

Under the provisions of the Civil Procedures Code 1983, the tribunal had limited jurisdiction over specific matters. This means that although international arbitration disputes may be permitted to be referred to arbitration, the arbitration must have taken place in Sudan and under the supervision of the National Court[21]. In order to enforce the arbitration award, new procedures must be started before the court. These procedures may involve consideration of the subject of the dispute, and any decision related to similar matters but must have been issued in Sudan and under the Civil Procedures Law 1983.

It would have been better if Sudanese law had included two distinct provisions in the Civil Procedure Code 1983 concerning the enforcement of court judgments and arbitral awards[22]. In this way, issues more related to the enforcement of arbitral awards could have been addressed[23]. For example, a provision could be attached to the Civil Procedure Code stipulating that it might enforce a foreign award as if it was a decision of a local court in Sudan.

In general, under Sudanese law, if enforcement of a foreign award is applied for in Sudan, it is the relevant Sudanese law that restricts the enforcement procedure. This is in line with the standard rule in most international conventions on the enforcement of foreign arbitral awards[24].

5.5 Enforcement and Recognition of Foreign Arbitral Awards under the Sudanese Arbitration Acts

Article 47 of the Arbitration Act, 2005 and Article 48 of the Arbitration Act 2016, are related to the application of the enforcement of foreign arbitral awards. It is distinctly clear that these two

[20] Ibid
[21] Azhary A. Sharshab, *Authenticity of the Foreign Judgment and its Enforcement Methods*, (AL Daar AL Sudaniya, 2013) 210
[22] Al-Bashir A. Awooda , *Enforcement of Foreign Judgement and its Effect*, (2nd edn, Khartoum University Press, 2013) 286
[23] Ibid
[24] Fath El Rahman A (n5) 213

articles are barriers to the Sudanese legal system recognising international commercial arbitration. However, foreign arbitration awards are treated in a similar way to foreign judgments and orders in Sudan[25]. This indicates that the Sudanese legislators have adhered to the traditional approach that foreign arbitral awards are not distinct from foreign judgments[26]. Therefore, it does not significantly assist international arbitration with regard to the recognition and enforcement of foreign arbitral awards.

Article 48 of the Arbitration Act 2016 provides five requirements that must be met to enforce a foreign arbitration award. Before discussing the terms, it is essential to clarify the effect of the term "foreign arbitration award". The Sudanese Arbitration Act 2016 used the word "foreign" without giving any explanation.

It can be seen that the Arbitration Act 2016 considered international arbitration in article 7. However, there are several interpretations of "international arbitration" that can be referred to a tribunal's ruling of international arbitration, as outlined in article 7. It also indicates the nationality of arbitrators or the place of the arbitral tribunal in disregard of the nationality of the arbitrators. It may also indicate the presence of any foreign law or arbitrator in the proceeding[27].

The Arbitration Act 2016 was enacted to be in line with international conventions accepted and ratified by Sudan. However, The Arbitration Act 2016 recognised only one type of arbitration, namely, international arbitration, but both statutes (2005 and 2016) failed to provide a precise definition of the term of 'domestic arbitration'. However, article 7 of the Arbitration Act 2016 is similar to article 7 of the Arbitration Act 2005 when it defines an 'international arbitration' in tandem with the definition as set out in the UNCITRAL Model Law. Article 7 read as follows:

> *"By the provisions of this Act, the arbitration shall be international in the following cases:*
>
> *A-Where the headquarters of the business of the arbitration party's business is in two different states*
> *B-where the subject of a dispute, included in the arbitration agreement is connected to more than one state."* [28]

[25] M. Taha, Abosamra. *Arbitration in Boot, Sudanese Law Reform*, (AL Daar AL Sudaniya 2005) 51
[26] Draig M. *Explanation of Arbitration Law 2016*, (1st edn, AL Daar AL Sudaniya, 2017) 156
[27] Al-Bashir A. Awooda (n22) 144
[28] UNCITRAL Model Law, 1985 Article 7

The above provision borrowed closely from the UNICTRAL Model law. It was expected that any interpretation of a provision by the court would be a challenge since the history of arbitration in Sudan did not consider arbitration as a reliable method of settling disputes.[29] The Arbitration Act 2016 was enacted to improve the practice of arbitration and included judicial criteria from the application of the Arbitration Act 2005. The arbitration law in Sudan, as in some other jurisdictions such as Egypt and Saudi Arabia, shows a distinction between national and international arbitration. This provision was quoted from the Civil Procedures Act 1983[30] and the words have been changed for the enactment of the Arbitration Act 2016. The Civil Procedure Code 1983 provisions regarded the enforcement of foreign judgments interprets an international seat as being more likely to be the intended application of a foreign award than the location of the dispute. Neither the parties nor the practitioners seem to have been open to such a discussion. However, this interpretation is based on the purpose of the terms of the Arbitration Act 2016 and the Civil Procedure Code 1983. Nothing is stipulated in the Arbitration Act 2016 that supports such an assumption.

According to the Sudanese Arbitration Acts, an arbitral award can be enforced at common law by bringing an action on it.[31] However; Article 48 of the Arbitration Act 2016 (and Article 48 of Arbitration Act 2005) is no exception. It provides a speedier mechanism whereby on application to the competent court, an arbitral award shall be recognised as binding and enforced by a convention country.[32]

Chapter V of the Arbitration Act 2016 contains requirements to be fulfilled by the party seeking recognition and enforcement of the foreign arbitral award in Sudan, and a comprehensive list of grounds for refusing recognition or enforcement of them. However, the Sudanese Arbitration Acts also failed to provide any specific term or period for the applicants to register the arbitral award as a court judgment in Sudan.[33] Thus, this represents a significant disadvantage to the enforcement procedure in Sudan because an award creditor should consider the period from the date of the award to register it as a judgment. However, a

[29] Ibrahim Draig , personal interview, regarding his view on the new Sudanese Arbitration Law 2016, held in Khartoum in July 2017

[30] Civil Procedure Code 1983, Art 306

[31] Kamil Idris. *Practical and Legal Structure and Monetary Vision in Arbitration Act 2005*. (1st edn. Al-Daar AL-Sudaniya, 2006) 26

[32] AL Khair Gashi, *The Difference between Arbitration Methods for Settlement of International Disputes*, (1st edn, University Institute for Studies, Publication and Distribution, 1999)

[33] Mutasim Hassan Mahjoub, 'The Problems of the New Law', paper presented at the seminar held in Kartoum in 26 October 2016, in the light of new Arbitration Law 2016

specific requirement to be satisfied for foreign arbitral awards for their recognition and enforcement in Sudan, the subject under Article 48 of the Arbitration Act 2016 provides that:

> *No execution of the award of a foreign Arbitration Tribunal shall be made, before Sudanese courts, save after verifying the satisfaction thereby of the following conditions:*
>
> *"A. the award or order is passed by an Arbitration Tribunal or centre, in pursuance of the arbitration rules of jurisdiction of international arbitration, prescribed by the law of the country, in which it has been passed, and it has been final, by such law;*
>
> *B. the opponents in the suit, in which the award has been passed, have been summoned and have been validly represented;*
>
> *C. the award or order is not inconsistent with an award or order, which has been previously passed by Sudanese courts in the same substantive issue of the dispute:*
>
> *D. The award does not include what is inconsistent with public order, or morals in Sudan.*
>
> *E. The country where the award is issued and requested to be enforced shall admit enforcement of Sudanese courts judgments, centres, and tribunal awards in its jurisdiction, or under the enforcement of award conventions ratified by Sudan."* [34]

The difficulty precedes one of the significant obstacles as to proof, and the party calling for enforcement must convince the court that the award is free of all the conditions stipulated in article 48. The Arbitration Act 2016 uses the expression "No execution" which indicates that even the court does not have the option to enforce the decision unless the five requirements are satisfied[35]. The words "No execution" in Article also makes this provision mandatory. The court has no discretion to refuse to enter an award as a judgment if the formal requirements of this Article are not met. The court will adopt a 'mechanistic' or 'formalistic' approach once these formal requirements are satisfied.[36]

Section 48 (a) of the Arbitration Act 2016 provides that the tribunal or the arbitration centre shall be competent to arbitrate the dispute. The legislator must decide that a reference to determining whether the tribunal or the arbitration centre is competent or not, by referring to the law of the state in which the arbitral award is to be enforced. If the body or centre is not

[34] Arbitration Act 2016, Art 48

[35] *Agrovenus LLP v Pacific Inter- Link Sdn Bhd* (2014) in Sundra Rajoo *Law , Practice and Procedure of Arbitration* (2nd edn, Lexis Nexis 2017) 812

[36] Ibid

competent to render this award, it should not be enforced in Sudan. It is clear that, if an unauthorised tribunal renders the award, recognition of it will be revoked. Therefore, the award has to be issued by a competent tribunal or arbitrator in the state where it was rendered. The law of the state where the award was rendered will govern the question of the jurisdiction of the tribunal to determine the dispute and all questions regarding the validity, effect, finality or existence of the award or the arbitration agreement between the parties[37].

However, the court has no discretion to refuse to enforce an award for reasons falling outside of these grounds.[38] Thus, for example, the existence of a confidentiality agreement about an arbitral award is not to be interpreted as providing grounds for the refusal of its enforcement.[39] Any error of law on the face of the 'record' and 'misconduct' on the part of the arbitrator (s) will debar enforcement under the Sudanese Arbitration Act 2016.

A concurrent enforcement proceeding in multiple jurisdictions is not a ground for refusing enforcement, on the basis that the registration of an award as a judgment in any country would be limited to the territory of that country and therefore poses no risk of different decisions.[40]

Sections (a) and (b) above are clear and consist of international enforcement rules. However, section (c) requires the party who seeks to enforce an arbitral award to search the judgments of the Sudanese courts to prove the consistency of the award with any judgement of the Sudanese courts. In other words, the award debtor can revoke the process of enforcement by proving that one court judgment or previous award rendered by an arbitral tribunal has occurred in the last ninety years, and successfully oppose the enforcement of the award.

The formulation section (c) is ambiguous and impractical. The appeal court judge A. Fudl[41] stated that

> *"This section relates to the concept of judicial efficiency, section (c) will be applied when the arbitral award conflicts with the judgment in the same dispute and between the same parties."* [42]

[37] Kamil Idris (N31) 312

[38] *Aloe Vera of America, Inc. v Asianic Food (S) Pie Ltd* 120061 3 SLR(R) 174

[39] *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 UKPC 11.

[40] Ibid 12

[41] A. Fadul is a General Court Judge in Khartoum (Magistrate Court), (The competent court for international arbitration according to Article 5.) interviewed by Ahmed Bannga, in Khartoum in December 2017

[42] Ibid

Omar[43] shares the same idea, in his review of section article 48 (c) which he thinks is adopted from Article 306 of the Civil Procedure Code 1983, he argued that the situation discussed is limited to a foreign judgment that violates the Sudanese judgement rendered in same dispute for the same parties nineteen years earlier.

However, this interpretation arises from the meaning of the terms in the Arbitration Act 2016 and Civil Procedure Code 1983. Indeed, nothing was stipulated in the Arbitration Act 2016 or Civil Procedure Code 1983 that supports such an assumption. In both situations, the law did not state the phrase "the same parties" or "the same dispute" to limit their application, as maintained by *Omar* and *Fudl*. The interpretation providing by *Omar* and *Fudl* may stand for simplifying the complexity of drafting in both articles to present them as practicable and acceptable. However, the Arbitration Act 2016 was an excellent chance for the Sudanese legislator to redraft the expression of Article 48 (c), avoiding the vague and weaknesses that have affected the Arbitration Act 2005.[44]

However, Sudanese law goes even further. It necessitates that a foreign order or award the enforcement of which is required in Sudan must not contravene an order or an award already rendered in Sudan. That indicates the priority of the Sudanese court decision over a foreign judgment or award, regarding their enforcement in Sudan.[45] Such a situation arises in the event of joint jurisdictions when both the Sudanese and foreign courts have the discretion to deal with the dispute. If the court believes that the judgment or the award does not contravene the basic rules of the law of Sudan or encroaches upon its national public policy or moral principles, it shall issue an order to admit the validity of the judgment or arbitral award.

Inconsistent judgments may arise in three ways; first: the existence of a similar judgment is not raised in the court in which another suit is pending[46]. Secondly, the existence of the judgment may be raised; however, the court rejects it as not having the effect of res-judicata,[47] and thirdly, a suit may be pending between the parties together. Pending litigation in another court is not a bar to the jurisdiction of the court when this defence is raised.

[43] Mohammed Omer *Civil Procedures Act 1983: The Regulations of Recourse & Execution Procedures*. (Buraag & Khateeb, Khartoum. 2016) 319
[44] Mutasim Hassan Mahjoub (33)
[45] Azhary A. Sharshab,(N21) 40
[46] Sundra Rjoo, *Law, Practice and Procedure of Arbitration*. (2nd edn, Lexis Nexis, 2017) 133
[47] Ibid

Under English Law, the defendant may request a stay of the order for enforcement, pending the determination of an application to set aside the award before the competent foreign court[48].

A pertinent question to raise here would be whether a Sudanese court would enforce a foreign award if an authorised jurisdiction has previously executed a court judgment, or court procedures are pending in a third country? Sudan may or may not have an agreement with the latter country for enforcing court judgments. Sudan is under an obligation to enforce court judgments passed in countries with which it has an agreement or bilateral treaties and is a subscriber to various Conventions for the enforcement of foreign judgments. Sudan is a party to the ICSID Convention 1965 and has also ratified the Riyadh Convention on Judicial Cooperation between the States of the Arab League of 1983. The Riyadh Convention provides[49] that if the dispute has given rise to another final judgment in the requested state or a third state and if the requested party has already recognised such a final decision then recognition must not be refused by local Sudan court.

However, that if a foreign judgment contradicts a previous Sudanese judgment concerning the same issue, it will not be recognised and enforced in Sudan[50] if the foreign judgment reflects the different notions of public policy, and the Sudanese court decision reflects Sudanese ideas, then, if the two decisions contradict with each other, Sudanese public policy and the Sudanese judgment will prevail. This applies an approach to abuse of process which has a long standing basis in English law as well. [52]

Further, if there are several judgments given in different states simultaneously concerning the same matter, one of the several judgments should be given priority over the others, and, on balance, this should be the first judgment.[53] Moreover, if there is a partial contradiction between the Sudanese judgment and the foreign judgment in the same matter, the court will have discretionary authority. If it finds that the contradiction is immaterial, it may set aside the contradictory part and go on to enforce the other issues in judgment. However, if it finds that the contradiction is substantial, it must reject executing the foreign judgment.

---

[48] *Chizyuka and Another v Credit Africa Bank Limited* [1999] (Appeal No. 8/113/99) ZMSC 47 (24 August 1999) in Redfern and Hunter (n8) 413

[49] The Riyadh Arab Convention on Judicial Cooperation 1 1983, Art 37

[50] Omer, Mohammed (n43) 123

[52] *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2002] EWCA Civ 1643; *Donohoe v Armco Ltd* [2002] 1 Lloyd's Rep 425 and *Glencore International v Exeter Shipping* [2002] 2 All ER (Comm) 1

[53] Ibid 116

Besides, this problem falls within the interpretation of public policy in section (d). For example, China has a form for rejecting awards under the principle of public policy when an award violates a mandatory rule.[54] However, this researcher believes that the drafting of the Arbitration Act 2016 presents Sudan as an unwelcome system in international arbitration in general.

Public policy is provided as a frequent basis for revoking the award[55] or refusing enforcement of foreign arbitral awards under section (d) of Article 48. This is another hindrance presented by this article, which increases the power of the court to refuse enforcement of an award. It is worth noting that some modern legislation limits public policy.[56] Indeed, the UNCITRAL Model Law applies the same expression to achieve compatibility with the New York Convention. Many practitioners argue in support of limiting the notion of public policy applying the principles of international public policy although the interpretation of its limits prevailed in the final draft of the UNCITRAL Model Law.[57] However, this ground has been used internationally to limit some attempts to enforce the award, especially when the state or its agencies are the award debtor parties.[58] It is easy to notice difficulties in the interpretation of public policy in Sudan unless the supreme courts provide guidance or a precise interpretation of such a ground.[59]

In *Ferrous v.Gibraiel Gair Albares*, the Sudanese Court of Appeal stated: [60]

> *"The tribunal's award is comparable to that of a court's award. However, it is not determined by the same rules applied to the latter's settlements for many purposes, one of which is that the*

[54] Fei, Lanfang, *Public Policy as a Bar to Enforcement of International Arbitral Awards: A Review of the Chinese Approach, Arbitration Internationa*l, (Kluwer International, 2010) 306

[55] Ibid

[56] In France, for example, the Arbitration Act 2011 limits the interpretation of public policy from national public policy to the international public policy. See Article 1520 (6)

[57] Howard M. Holtzmann and Joseph E. Neuhaus, *A guide to the UNCITRAL Model Law on International Commercial Arbitration*, (2nd edn. Kluwer Law and Taxation Publishers, 1989) 910–911. Despite the influence of the modern interpretation of public policy, especially, by the French ordre public externe the Working Group chose the broader interpretation.

[58] Bernard Hanatiou & Olivier Caprasse '*Whatever the freedom surrounding international arbitration, a limit still exists to that freedom: public policy', Public Policy in International Commercial Arbitratio*n, cited in Gaillard, Emmanuel & Di Pietro, Domenico, *Enforcement of Arbitration Agreement and International Arbitral Awards*, (Cameron Arbitration Institute, 2008) 777

[59] The higher courts or the Supreme Court may deal with the public policy issue with guidelines from the practices of other countries. Redfern & Hunter, *Law & Practice of International Commercial Arbitration,* (4th edn, Sweet & Maxwell, reprinted 2007) 539–543, gives example of the courts in many jurisdictions regarding the interpretation of public policy.

[60] *Ferrous v.Gibraiel Gair Albares* (2013) CL209 K. Court of Appeal 2013

arbitrator is appointed by the parties (party autonomy) and often lacks the legal knowledge that is accessible to a court judge." [61]

An examination of the above passage would mean that there is a continuing problem when matters of enforcement are taken to the Court of Appeal as there is still the issue of public policy. In most cases, the power of the judiciary confronts the concept of arbitration, which is built on the free will of the parties to use their arbitrators[62]. However, the courts in Sudan do not deal with the arbitrators as being on the equivalent rank as the judges of public courts.

Every legal system has its theory of enforceability of foreign arbitral awards or judgments, and its safeguards designed to prevent any possibility that the judicial machinery of the state might be used to give effect to foreign awards which are out of harmony with the conception of justice in that jurisdiction.[63] The requirement of reciprocity was introduced in the existing Civil Justice Ordinance Act 1929 but repealed by the Civil Procedure Act 1974. The latter did not contain any provision relating to reciprocity[64]. Section 306 of the Current Civil Procedure Act 1983 provides that the foreign country in which the foreign judgment was rendered must agree to enforce Sudanese judgments in its courts. The Sudanese legislature may have aimed section 48 (e) of the Arbitration Act 2016 to emphasise the principle of reciprocity in the enforcement of awards and judicial orders[65]. However, this section raises a new difficulty to the party who seeks to enforce the award. The party will have to prove that the seat court has not previously rejected enforcing the Sudanese court judgement or award. However, in the absence of bilateral or multilateral treaties between Sudan and the seat of the arbitration state, no one can be sure that the seat state will be willing to enforce Sudanese judgments or awards until early judgments or awards are enforced.

The requirement of reciprocity as it is stated in the Arbitration Act 2016 is considered to be an absolute requirement upon which the enforcement of foreign awards is determined.[66] Since this requirement is determined in general terms, the Sudanese courts must exercise their discretionary powers to see whether the foreign country accepts enforcement of the Sudanese court's decisions in its jurisdiction[67].

[61] Ibid 18

[62] AL Khair Gashi (n32) 117

[63] Sundra Rajoo (n11) 799

[64] K.D.D Henderson (n19) 321

[65] A. Fadul (n31)

[66] Personal interview with Chancellor Babikir Al-Tinie in Khartoum, 2 May 2017

[67] Ibid

The lack of competence usually arises owing to the violation of the law governing the arbitration agreement[68]. Also, if the subject matter of the dispute referred to arbitration lacked arbitrability according to the law of the state in which the award was rendered. It could also arise relating to the misconduct of arbitrators or bias, for example[69]. However, some legislation has decided that arbitration should not be enforceable in matters where conciliation is not permitted.[70] The League of Arab States Agreement on the Enforcement of the Judgment expressly provided for this condition in Article III thereof. The Riyadh Convention on Judicial Cooperation also provided for the same condition in article 37; article 69 of the Agreement between the Government of Sudan and the United Arab Emirates made a similar provision.[71]

In other words, the foreign awards or judgments may be worthless in Sudan unless the foreign law in question grants mutual recognition and enforcement of awards or judgments from Sudan by a signed agreement. Without a written agreement providing for reciprocal enforcement, Sudanese law states that the court in Sudan may render an order of enforcement refusing to grant an application for recognition and enforcement. Mutual enforcement may also be determined by a legal document issued by the Sudanese Government.[72] However; in some respects, there are reasons for the researcher to argue that the Sudanese laws on arbitration are less sophisticated regarding the enforcement of foreign arbitral awards. Thus, it is submitted that, although the idea of reciprocity is desirable between Sudan and other states, it is not favourable regarding individual rights and interests which must be separated from political considerations, and must be governed merely by the standards of justice and the need for international transactions without any consideration of external factors.

However, *Hussein Awad Abo Elgasim* [73] explained the current situation in the national courts. The case dealt with the issue of the judges exercising their discretion in any proceedings for recognition and enforcement of foreign arbitral awards. They treat foreign awards as a

[68] George A Bergmann, 'The "Gateway" Problem in International Commercial Arbitration' in Yale Journal of International Law (2012) YJI 37 309-342

[69] Mohamed M. Adam, *Enforcement of Foreign judgments in the Sudan*. (Dr. Adam & Associates May, 2015) 34

[70] Ibid 70

[71] Fath El Rahman A. El Sheikh, *The Legal Regime of Foreign Private Investment in Sudan, and Saudi Arbitrations*, (1st edn, Cambridge University Press, 2009) 108

[72] Al-Bashir A. Awooda, *Enforcement of Foreign Judgement and its Effect*, (2nd edn, Khartoum University Press, 2013) 286

[73] O. Ali, Judge of High Court and the manager of the Sudanese Judges' Training Centre, lecture held in Ministry of Justice, Khartoum, 29 October 2016

foreign judgment, and as a result, they apply article 306 and the Sudanese domestic laws, and not one of the Conventions to which Sudan is a signatory.[74]

Nevertheless, article 48 (c) deals with the arbitration in the same process as litigation, ignoring the philosophy of arbitration, and extending the influence of courts to limit international arbitration generally in Sudan. Indeed, at the end of March 2017, the Sudanese courts had not received any request to enforce a single foreign arbitral award. However, some practitioners state that the parties tend to transform arbitral awards into court judgments at the arbitration seat[75]. This step may assist the parties that seek to enforce them in Sudanese courts by invoking any bilateral or multilateral agreements in force for judicial cooperation. These treaties allow enforcement of arbitral awards without the need for seat court approval.

Despite all the obstacles addressed above, article 48 of the Arbitration Act 2016 outlines the general grounds for refusing to enforce an award under the New York Convention. The concept of finality and justice and public policy and reciprocity in sub-paragraphs (a), (b), (d) and (e) of Article 48 has already been adopted in international commercial arbitrations. The only challenge in article 48 is sub-section (c), in addition to the weak power of the court to support enforcement. The first two terms in the article discussed are: "Not to execute". The exact interpretation of the Arabic text is "the court may not implement", which gives a negative message to the judge and makes him less willing to enforce a foreign award.

5.6 Application to the Competent Court

The parties to an arbitration agreement impliedly promise to one another to permit enforcement of the arbitral award.[76] Article 41 of the Arbitration Act 2016 makes it clear that awards are to be final and binding. It also sets out the procedure for an application for enforcing an award under article 48, which explains that a claim for enforcement of an award must include a concise statement of the remedy claimed and the question on which the applicant is seeking a decision from the court. Also, it must state the grounds on which an application is being supported to show that the legal requirements have been met and confirm that it is made under article 48 of the Arbitration Act 2016. Then the respondent's case must be clearly stated.

[74] Hussein Awad Abo Elgasim, 'Arbitral Award', in Sudanese Judicial Judgment Journal (2009), SJJJ No 102 ,109

[75] Personal interview with Chancellor Babikir Al-Tinie in Khartoum, 2 May 2017

[76] *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* (2003) UKPC11 at (9)

However, under article 48 of the Arbitration Act 2016, the court is empowered to ensure that the award is made as it is contemplated to be in the arbitration agreement.[77] The court has no discretion to modify the award or to return it to the arbitrators, and if the court finds that the award exceeds the authority of the arbitrators, it will reject registration thereof. On the other hand, if the court finds the award does not need to be returned to the arbitrators for a review or if the 14 days as of the date of notification of the parties has expired and the party has not requested to set aside the award the court will issue a judgment in compliance with the contents of the award (article 43). Issuing such a judgment means leave to enforce the award has been given.[78] Once the 14 days period has expired, the usual enforcement proceedings available in the Court of Appeal such as the writ of seizure and sale, garnishee proceedings (including bankruptcy or winding-up proceedings) will be available to the award holder.[79] The Sudanese Arbitration Acts do not provide a requirement to apply for such a remedy at the time of making an application for judgment. The courts would rarely make such an order without notice. The judgment or order will include both the costs and any interest awarded by the arbitral tribunal. Even though costs awarded by the arbitral tribunal have not been taxed or agreed upon, they are to be included in the application for enforcement.

An award of interest is deemed to form part of an award. Consequently, the interest component of the award is included when an application to enforce the award is made.[80] A claim for the interest, which has accrued following the making of the award, has to be contained in a separate certificate. The order should also contain the provision for the payment of the costs for seeking enforcement of the award, no matter how small that amount may be. Article 41 of the Arbitration Act 2016 states that:

> *"The award of the arbitration tribunal shall be binding and shall automatically be enforced, or upon a written request to the competent court, to which is attached an authentic copy of the original award."* [81]

In particular, Sudanese courts enforce awards where the substantive cause of action is based on one of the laws enshrined in an international or a bilateral convention which has been ratified by Sudan. However, whenever an award creditor seeks any recognition and

[77] Chancellor Babikir Al-Tinie (n75)

[78] *Malayan Flour Mill v Raja lope & Tan Really Co*. (2000) 6 MLJ 591 at 598 per Ramly Ali JC

[79] Ibid 32

[80] Sundra Rajoo Bremer (n11) 623 see *Handels GmbH v Deutsch Conti-Handels GmbH (interest)* 1984 2 Lloyds's Rep 121

[81] Arbitration Act 2016, Art 40

enforcement of the award, he must apply to the appropriate court requesting registration of the award.

Non-Muslim parties seeking enforcement of an arbitral award in Sudan need to know the enforcement procedure of a foreign arbitral award[82]. This becomes a more common notion due to the schools of theology which govern Sharia, which is interpreted differently in different groups, for example, the Shia sect on one side and Sunni sect, on the other. There is a crisis between non-Muslim states and Islamic law in the application of enforcement of foreign arbitral awards or judgements;[83] for example, as it occurred in *Beximco Pharmaceuticals v Shamil Bank of Bahrain*[84] However, Sudan is challenging to enforce foreign arbitral awards, particularly in cases of conflict between Islamic law and the national laws of non-Islamic countries.

The application may be made without stating the name and usual or last known place of business of the applicant and the respondent but must state that award has not been complied with to date. Besides, under article 24 of the Arbitration Act 2016, a duly certified translation of the award or agreement in the Arabic language shall also be submitted to the court, where the award or arbitration agreement is in a language other than the Arabic language unless the parties agree upon another language; which would be accepted by the courts.

However, article 47 of the Arbitration Act 2016 defined the requirements for an application for enforcement of an arbitral award, and it must satisfy the following conditions:

> *"(a) attachment of a copy of the Arbitration award;*
> *(b) end of the date of instituting the nullity request;*
> *(c) the award debtor having adequately been informed;*
> *(d) the award, or part of it, is not contrary to public order in Sudan*
> *the court shall enforce what is compatible with public order while abstaining the part contradicts with public order."* [85]

[82] Al-Bashir A. Awooda (n72) 341

[83] Fath El Rahman A. El Sheikh (n55) 209

[84] *Beximco Pharmaceuticals Ltd and others v Shamil Bank of Bahrain* EC [2004] EWCA Civ 19 (28 January 2004). The English Court of Appeal dismissed Islamic law as the governing law of the contract. The court in this case held that Islamic law did not constitute a legal system, without a clearer explanation of what precise Islamic system was being chosen.

[85] Arbitration Act 2016 , Art 47

This article does not provide for any formal requirements for an arbitration agreement or application to be developed in writing. Some lawyers[86] however, argue that article 47 of the Arbitration Act 2016 can be read as requiring such a condition. This article requires that the award creditor applies to the competent courts to enforce the award. The arbitrator must satisfy the qualifications required for enforcement of an award. This article also states that copies of the arbitral award must be attached.

However, article 47 of the Arbitration Act 2016 is similar to article 156 of the Civil Procedure Code 1983 which provides for restricting the requirements of the application for leave for enforcement of an arbitral award, and to seek permission to enforce an award must meet the following requirements[87].

(1) An application must be in writing.
(2) It must be in the form of a suit between a person who seeks recognition and enforcement of it.
(3) All persons involved in the arbitration must be notified.
(4) The court must hold an open hearing to hear the parties; and
(5) if the court ensured that an award is valid under the agreement and satisfies al1 the requirements, the court will render its verdicts in the form of a judgment.

Many Sudanese lawyers have criticised these conditions. It is said that registering the award as a suit will involve all the procedures related to a civil suit, which could lead to some undesirable consequences. First, an appeal can be made against any decision on the same grounds that can be invoked to challenge the civil suit and consequently, the hearing could be delayed. [88] In other words, this provision makes the procedures applicable to the civil suits equal to those applicable to arbitration proceedings. Thus, the most important advantages of arbitration, i.e., that it provides a very effective method for dispute resolution, saving time and expense, will be lost.[89] Also, it must be mentioned that the fee for a civil suit in Sudan is too high, to the extent that it makes it unattractive, which works against the national economic interest as it discourages businesses from engaging.[90] This is because the risks may

[86] Kamil Edris, in the seminar on the light of new Arbitration Law 2016, held in Khartoum University in October 2016
[87] Civil Procedure Code 1983, art 156
[88] Mohammed T. Abosamra (n45) 67
[89] Registration must be made to the proper party.
[90] Osman Al - Haddad, *The Intervention of the Sudanese judiciary in Arbitration, Assistance and Supervision*, (1st edn. Dar El-nashir Press, 2017) 247

be perceived as too high, or the costs are perceived as prohibitive. Either way, the free flow of trade is hampered.[91]

5.7 Challenging an Arbitral Award under Sudanese Arbitration Law

Arbitral awards in Sudan are final and not subject to any appeal on the merits or mistakes of fact or limits of the law. Article 49 of the Arbitration Act 2016 states that: "*No order passed by the competent court to execute the Arbitration award shall be appealed against*."[92] The Sudanese Court of Appeal noted in a case that the arbitral award was final on its merits, and the arbitration parties were not entitled to appeal on the subject of law or issue of fact before the Court of Appeal.[93] The only opportunity to challenge the arbitral award would be to set aside the arbitral award if one of the conditions set out in Article 42 of the Arbitration Law 2016 arises.

Applications for registration of an award are either met with or preceded by an application to set aside an award under article 42 of the Arbitration Act 2016, or by an application to refer a point of law arising from the award to the Court of Appeal under section 47 of the Act. Also, the Arbitration Act 2005 dealt with the questions of the nullity of an arbitral award whether rendered inside or outside of Sudan as per article 44 of this Act.

The Act also does not explicitly provide whether the part of an award that remains unaffected by a contrary finding on a question of law or a setting aside will then go on to be considered for registration and enforcement. However, article 42 of the Arbitration Act 2016 sets out limited grounds for the refusal of enforcement of the award.

A party seeking to revoke an award in Sudan needs to apply to the Court of Appeal for revocation within fourteen days after the judgment of the court. It can be argued that two weeks is too short a term within which to apply. Article 42 of the Arbitration Act 2016 provides the grounds on which any party can seek to invoke the award. However, article 34(3) of the UNCITRAL Model Law differs from it on two points[94]. The Model Law is more specific. It provides a three month period for challenging an award from the date the arbitral tribunal has disposed of an application for review or interpretation of the award, or an

[91] Ibid
[92] See the Arbitration Act 2016, art 49(1)
[93] *Marble Art v. Abdel Aziz Abbas & the Gov. of Sudan* 2014 The Constitutional Court C.J/66/ decision was notified to the parties on 12 February 2017. (The Law Journal of the Constitutional Court was not yet printed)
[94] See article 34(3) of the UNCITRAL Model Law

additional award dealing with applications submitted in the arbitral proceedings but excluded from the award.[95] No such provisions are stated in the Arbitration Act 2016. Also, the Model Law provides that the court may refuse the setting aside proceedings for a period defined by it if the court finds it appropriate to do so, or if one of the parties requests it, to allow the arbitral tribunal to continue arbitration proceedings.

According to article 42 (1) of the Arbitration Act, 2016 both parties might request the dismissal of an arbitration tribunal award, for nullity, from the Appeal Court for any of the following reasons.

5.7.1 The Lack of a valid Arbitration Agreement

> *"a. Where there is no arbitration agreement or is null, applicable to be null or ceased due to expiry if there is no agreement between the parties to refer the dispute to arbitration."* [96]

Unlike Sudanese law, the Model Law does not specify the terminated date or ground for setting aside the award. More importantly, the Model Law provides that the validity of an agreement must be assessed against the law to which the parties have referred, or in the absence of such an agreement, against the law of the seat of arbitration.[97] However, Sudanese law does not make it clear which law would be applicable. It is presumed that the parties have chosen the Arbitration Act 2016 to govern their dispute, but if the arbitration seat is outside Sudan, despite choosing Sudanese law, sometimes the law of the seat of arbitration might be applicable[98].

In general, under the Arbitration Act 2016, an arbitration agreement has to be in writing in order to be valid. Issues such as the capacity of the party and non-arbitrability of the subject matter of the disputes covered by the agreement may also point to the nullity of the award.[99] It has been argued that voidable agreements cannot be nullified if a valid reservation has already been made by the party claiming the voidability of the award.[100] Also, if an award is rendered after the expiry of the arbitration agreement, but within the period renewed by the

[95] UNCITRAL Model Law, art 34(3). See also Sundra Rajoo Bremer (n11) 902
[96] Arbitration Act 2016, Art 42(1) (a)
[97] UNCITRAL Model Law on International Commercial Arbitration (1985), Art II (1), (2) and (3)
[98] Kamil Edris, (n89)
[99] However , the conditions for the validity of the agreement specified in Article 42 of the Sudanese Law are in general, and the article ignored the detailing of essential points in the agreement, for example, it did not specify what disputes could not be resolved through arbitration (Arbitrability); also the article did not define what a lack of incapacity is.
[100] Howard M. Holtzmann and Joseph E. Neuhaus (n47) 923

tribunal or by the parties, it cannot be revoked.[101] The possibility of litigation against a tribunal decision by setting the non-existence or invalidity of the arbitration agreement has also not been provided for in the Arbitration Act 2016.

5.7.2 Incapacity of a party

> *"b. If one of the parties to the arbitration agreement, at the time of agreeing, was under some incapacity according to the law that governs his capacity."* [102]

The capacity of the parties to any contract is a critical ground on which the contract is to be considered as valid and effective[103]. The same applies to an arbitration agreement. The 2016 Arbitration Act did not define the level of the natural capacity of a person to determine the legal competence they need to enter into a contract. Article 3 manly provides a general term that did not define or detail the symptoms of incapacity. The capacity of a natural person falls into one of three categories: full capacity, reduced ability, and incapacity.[104] It is necessary to distinguish between defective consent and capacity, i.e. consent vitiated by errors, fraud and intimidation[105]. This distinction may have a significant result on whether the conditions of capacity can be invoked, in particular, to consider the validity of an award. The Egyptian legislation distinguishes between capacities and lacks consent. If incapacity is determined, then any contract concluded by the incapacitated person will be null and void[106]. This researcher argues that anyone with a lack of capacity can use that to apply for nullity of the arbitral award, even if they lie and pretend that they have the full capacity or prove it by fraud. In these cases, the other party is left with only one option, which is to seek compensation for any loss it sustained.

However, the New York Convention, Article V (1) (a) has made an explicit provision regarding the issue of capacity, stating that it is permitted to contest the validity of an arbitral award on the grounds that the award debtor lacks the capacity to conduct a valid arbitration agreement. Two matters necessitate special consideration; first, article 5 (1) (a) stated that the

---

[101] Ibid
[102] Arbitration Act 2016, Art 42(1) (a)
[103] Alan and Martin Hunter, *Law and Practice of International Commercial Arbitration*, (Sweet & Maxwell, 1991) 213
[104] Zaki Mustafa, *Opting Out of the Common Law: Recent Developments in the Legal System of the Sudan*, (2nd edn, Khartoum University Press, 1973) 29
[105] Abdel Hamied AL Minshawi, *Arbitration in Internal and International Special Relations* (3rd edn, Daar AL fiker AL arbi, 2010) 503
[106] Ibid

capacity of the parties must be decided by evidence of the law "relevant to them".[107] However, the text does not limit the choice of rules of law related to this decision, leaving it to the competent state court to deal with any conflict of law rules.

Second, article V (1) (a) of the New York Convention is limited to a lack of capacity to conclude the agreement at the time it was conducted.[108] It does not deal with any lack of ability to conclude the primary contract or the lack of adequate performance throughout arbitration proceedings[109]. This conclusion is particularly crucial concerning judicial authorities whose arbitration laws require the exclusive right to enter into arbitration agreements.

5.7.3 Not given proper notice

> *"c. If one or both parties were unable to present his case as a result of not having been given proper notice to appoint an arbitrator or of the arbitral proceedings or to any other reason out of his control." [110]*

The provisions in articles 43(c) and 48 (b) are aimed at ensuring that the arbitration was conducted fairly. This fairness is to be secured by ensuring that parties to the arbitration have been given proper notice and a fair opportunity to present their cases, and the representations of the parties were made in respect of the law to which they are subject. If the arbitration were conducted without observing this procedure, the courts would refuse to recognise it. As regards a mistaken view of the facts, it is arguable that the Sudanese court ought not to investigate the facts on which the decision was based, which would involve a rehearing of the case.[111]

The New York Convention[112] provides that the arbitral award may be set aside if an award debtor can prove that the arbitral tribunal did not give him proper notice of the arbitral proceedings or the name of the arbitrator or if the award debtor was unable to present his case for some other causes.[113]

---

[107] Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretatio*n. (Kluwer Intentional Law, 1981) 292
[108] Ibid
[109] ibid
[110] Arbitration Act 2016, Art 42(1) (c)
[111] Mohamed M. Adam, *Enforcement of Foreign Judgments in the Sudan*. (Dr. Adam & Associates, Khartoum. May 2015) 34
[112] New York Convention1958, Art V(1) (b)
[113] A J van den Berg Final Award, Yearbook *Commercial Arbitration*, (Walters Kluwer Law & Business, 2014) 332

Where the foreign court has given a decision on an erroneous view of their law, then the Sudanese courts ought to recognise and enforce the foreign order.[114] It is maintained that if a foreign judgment is based on a mistaken view of Sudanese law, then the courts in Sudan will not enforce the foreign judgment.

This defence is not available under English law. In an English case of *Pemberton v. Hughes* [115] the court held that:

> *"If a foreign court pronounces a judgment over the person within its judgment and in the matter with which it is competent to deal the English courts never investigate the propriety of the proceedings unless they offend against English view of substantial justice" [116]*

The enforcement of a foreign award may be refused under the New York Convention if the defendant proves that he "… *was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case.*"[117] This ground overlaps as they both concerns alleged infringements of correct arbitration procedures. The Riyadh Convention[118] and the Arab League Convention[119] also provide that enforcement of an award can be refused if the parties were not duly summoned to appear and heard. It is necessary to clarify that foreign awards will not be recognised unless the court is convinced that where the arbitration was conducted or the award was made, there has been an opportunity for a full and fair appearance, and that includes the parties having been given proper notice and had a fair hearing.[120]

If the award is not final, that will also grant the Sudanese court the right to refuse enforcement.[121] However, it should be pointed out that the applicable law to define an award would be deemed as the law of the seat where the final award was rendered[122]. It must be final and based on the considered views of the tribunal.

---

[114] Fath El Rahman A.El Sheikh, (n65) 205
[115] *Pemberton v Hughes* [1899] 1 Ch 781
[116] Ibid 112
[117] New York Convention 1958, Art V (1) (b)
[118] Riyadh Arab Agreement for Judicial Cooperation 1983, Article 37(d).
[119] Arab League Convention 1945, Art 3(d)
[120] Sundra Rajoo (n52) 782
[121] Civil Procedure Code 1983, s 306 (B)
[122] Al-Bashir A. Awooda (n92) 312

5.7.4 Failure to Apply the Applicable Law

> *"d. If the award set aside the applicable law that the parties agreed to apply on the merit of the dispute."* [123]

Sudanese law in this respect follows the New York Convention,[124] but there is no such provision in the UNCITRAL Model Law. Much other legislation also does not include such a provision, for example, Egypt and Saudi Arabia[125]. If the arbitrator fails to apply the applicable law, it can result in the nullification of the award on the ground of misapplication of the law.

Therefore, it can be said that the above text opens the door to a significant review of arbitral awards whilst at the same time, this review is limited to the application of the applicable law. Also, it empowers courts to investigate the process whereby the law has been applied in arbitral proceedings[126]. Regarding errors, it may be asked that whether the court should disregard the facts if it were proven that the evidence or declarations based on which the award was rendered were false, that some evidence was not disclosed by one of the parties, that there were certain contradictions in the award, or that one of the parties used corrupt means during in the arbitral proceedings.

Although the Model Law refers, through article 28, to how the court determines the laws applicable to the subject matter of the dispute, it does not expressly show what would happen if the arbitrator makes a mistake in determining the applicable law.[127] Therefore, the question arises as to whether the parties have any remedy, for example, in a case in which the arbitrator applies Egyptian law, regardless of the parties' agreement that Sudanese law governed their contract.

---

[123] Arbitration Act 2016, Art 42 (1) (d)
[124] New York Convention 1958, Art V (1) (d)
[125] Abdul Hamid El-Ahdab, Arbitration with the Arab Countries, (3rd edn, Kluwer Law International, 2011) 256
[126] Osman Al - Haddad, (n92) 117
[127] Ahmed M. Sheta, *The Arbitration an Explanatory and Comparative study of Judicial Provision & Arab and International Arbitration Institute* (3rd edn, Daar AL Nahda Al-Arabiya, 2009) 408

5.7.5 Formation of the Arbitral Tribunal not in line with the Parties' Agreement

> *"e. if the formation of the tribunal or the appointment of the arbitrators was not according to the law or the parties' agreement."* [128]

Under article 47 (a) of the Arbitration Act 2016, recognition of a foreign arbitral award might also be refused where the formation of the arbitral tribunal or the arbitral process appeared to violate the provisions of the agreement of the parties.

The award debtor may seek to revoke the arbitral award based on irregularities in the formation of an arbitration tribunal. The New York Convention states that enforcement of an arbitration award may be refused if it disclosed that the arbitral tribunal had not been adequately formed;[129] or, for example, if the arbitration proceedings are not conducted in line with the agreement as stipulated by the parties, or if it is not in line with the law of the country in which the arbitration took place, or matters such as the number of arbitrators, the process by which the arbitrators were selected, or a lack of independence and impartiality by the arbitrators occurred.[130] For instance, if an arbitrator 'upon his appointment' did not reveal circumstances that might cause critical uncertainty about his impartiality and independence, and the award creditor becomes aware of these facts after the award is rendered, the award may be nullified. This is because the law dictates that the tribunal must be constituted of impartial and independent arbitrators.[131] The wording of the 42 (e) shows that, when settling the form of the arbitrator, there is no advantage in the parties agreeing on Sudanese law while the international trend is to grant priority to the agreement.

5.7.6 Excess of Authority

> *"f. The award has determined issues not included in the Arbitration Agreement or exceeds the limits of agreement, nevertheless, if it is possible to separate the issues submitted to the arbitration from the issues not submitted to arbitration, the nullity shall fall into the latter issues only."* [132]

[128] Arbitration Act 2016, Art 42 (1) (e)
[129] Albert Jan van den Berg (n107) 114-116
[130] Ahmed M. Sheta (n127) 420
[131] Mohammed T. Abosamra (n88) 140
[132] Arbitration Act 2016, Art 42(1) (f)

There is no doubt that the arbitral tribunal primarily obtains its power and jurisdiction from the arbitration agreement concerned[133]. This agreement specifies the scope in which the court must operate its role and that it should not exceed this limit; otherwise, it can be contested to the court based on lack of jurisdiction. International law and national regulations give the award debtor the right to challenge this award[134]. The Model Law refers to this reason as a ground for challenging the arbitral award. Article 34 of Model Law 1965, states that the court may nullify the arbitration award if it;

> "…*deals with matters that have not been considered or do not fall within the scope of the arbitration agreement, or include decisions on matters outside the scope of the arbitration agreement*…" [135]

Also, the Sudanese Arbitration Act of 2016 permits challenging an award due to the lack of jurisdiction, or a settlement on matters not included in the arbitration agreement. In the case of *Mustafa Abdian v English and Science School,*[136] there was an arbitration agreement to arbitrate the dispute that arose over the rent payable on a property owned by the applicant, which resulted from rent arrears. However, the arbitral tribunal exceeded its jurisdiction and decided that the defendant should pay the rent arrears beside the construction costs made in the property, for the benefit of the applicant. The award debtor challenged the award in the Court of Appeal, and obtained nullification of the award, and a ruling that the arbitral tribunal had exceeded its jurisdiction and the scope of the arbitration agreement. However, a court may also rely on the general terms and principles of the contract under Sharia with article 42 (e) of the Arbitration Act 2016 that obliges the court to revoke the award as it violated the Islamic principle.

Article 5 (1) (c) of the New York Convention also deals with an excess of arbitrators' power, and not only with the range of the applications submitted to arbitration.[137] The article would, therefore, be applied if the award decides matters that do not fall within the scope of the related arbitration agreement.

[133] Alan and Martin Hunter (n103) 209
[134] Ibid
[135] Article 34 of Model Law 1965
[136] *Mustafa Abdian v English and Science School* (2019) Cl219 Court of Appeal
[137] A J van den Berg (n98) 314-315

5.7.7 Defect in the Award or the Proceedings

> *"g. If the arbitration award is annulled or the arbitration procedures are annulled, which affected the award."* [138]

The lack of due process has been identified as the most significant ground on which parties may seek rejection of an enforcement application.[139] Due process is meant to ensure that the parties involved receive a fair trial.[140] Nevertheless, if a party seeks an arbitral award and enforcement is refused on the grounds that due process was not observed, then the contestant must justify their alleged grounds to refuse to enforce the award.

Specific errors that sometimes occur during the arbitration process may give rise to the challenge of an arbitration award, which is usually at the end of this procedure. The Model Law,[141] as well as the Sudanese Arbitration Act, provides for challenging the award on the basis that the party was not properly notified, the procedure for appointment of an arbitrator or arbitration procedure was improperly carried out, or that the award debtor was unable to submit his statement[142].

The text above deals specifically with violations of fundamental standards of due processes, such as procedural integrity, the opportunity to present a dispute, and the holding of a fair hearing. Article 42 1 (g) of the 2016 Act directs on non-compliance with regard to the arbitration procedures other than due legal procedures agreed upon by the parties. Therefore, if the award is not challenged under article 42 (1) (g), it may provoke the basic requirements of legal procedures under article 42 (1). For example, if the agreement of the parties provides that it is not the right of one of the parties to attend the tribunal for a hearing to raise his case, or not to disclose the names of the arbitrators to the parties, that would be inconsistent, with the basic requirements of due process.

According to article 5 (1) (d) of the New York Convention, a procedural question may arise if the arbitrator does not apply the procedural rules determined by the parties, according to the

[138] Article 42 (1)(g) of Arbitration Act 2016
[139] Albert Jan van den Berg, (n102) 297
[140] Redfern and Hunter (n 39) para 10-39
[141] Article 34(2) The Model Law
[142] Fath El Rahman A.El Sheikh, (n114) 209

mandatory rules of the seat of the arbitration.[143] The Sudanese Arbitration Act does not explicitly state how a tribunal should take an oath from a witness. It simply states that if there is a witness related to the dispute, the arbitrator must consider an oath[144]. The process of taking this oath in the Sudanese legal system is explained in articles 23 and 24 of the Evidence Code1994, and not in the arbitration law.

5.7.8 Violation of the public policy

> *"The appeal court may adjudge the nullity of the award, of its own motion if the award contravenes public order in Sudan."* [145]

It is a well-established rule that no suit can be raised on a foreign award which is contrary to the Sudanese principles of public policy norms of morality, discipline, ethics, and values.[146] All these norms must be respected whenever the Sudanese courts are confronted with any dispute about a foreign arbitral award or judgment, i.e., any foreign order infringing these norms must be rejected. The issue of public policy has been discussed in detail in chapter four of this research.

In summary, public policy is a relative concept, which differs in its application from one place to another and from time to time according to the current values maintained by the society concerned.**[147]** Hence if a Sudanese court is facing a foreign arbitral award or order seeking recognition in Sudan which outrages sharia law such as a foreign award or judgment concerning gambling or the principle of polygamy, the court must refuse to recognise i[148]t;

Section 306 of the Civil Procedure Acts 1974 and 1983 also provides that a foreign judgment must not run in contrast to the principles of public order or morality in Sudan. Although the repealed Civil Justice Ordinance 1929 did not expressly mention this requirement, it can be implied from the concept of public policy, which is an overriding consideration in the field of foreign awards. However, section 48 (e) of the Arbitration Act 2016 contains two grounds of public order and public policy, which deal with the issue of recognition and enforcement of foreign arbitral awards. Furthermore, that section specifies that a competent court may refuse

[143] Albert Jan van den Berg, (n102) 311
[144] Kamil Edris, (n98) 176
[145] Arbitration Act 2016, Art 42(3)
[146] Ibrahim Draig, *Internal & International Arbitration*, (Daar AL- Nashir, Khartoum 2014) 90
[147] Sundra Rajoo (n52) 789
[148] Farah, Mohammad A *The Necessary Substantive Rules for an Arbitral Award*, (Khartoum University Press, 2017) 266

the award only if the appeal for setting aside is based on the grounds that are 'inconsistent with morals in Sudan.' That raises a specific question on the arbitration law in Sudan in that what establishes a 'moral' is not explicitly identified, whereas, as per Sharia under Article 5 of the Sudanese Constitution 2005, such reasons stem from a violation of Sharia principles or public policy.[149]

5.8 A Foreign Award Obtained by Fraud is not Enforceable in Sudan

The Arbitration Acts 2016 did not explicitly state that an award obtained by fraud in a foreign jurisdiction would be refused. A foreign arbitral award, which is contrary to public order and public morality, will not be recognised in Sudan. It should be mentioned here that public policy constitutes an exception to the case that recognition and enforcement will usually be granted on the basis of a convention provision, provided of course Sudan is a party to it. Thus the exception is not meant to be against the foreign law of the seat where the award is rendered but, against the effect. A decision based on such law would not have any effect in a Sudanese court. An award obtained by fraud would not be recognised.[150]

It should be mentioned here that the official language of arbitration law in Arabic. The Arabic word for the term 'award' is identical to the Arabic word for the term 'judgment.' That has caused arguments about the interpretation of those provisions, which governs arbitration in the Civil Procedure Code 1983. Some authors [151] argue that Article 306 of the Civil Procedure Code 1983 is concerned with the recognition and enforcement of foreign judgments. In order to resolve this problem, it would be better for the legislator to provide a clear articulation of the grounds for not recognising and enforcing an arbitral award under the conventions which Sudan has ratified.

On the other hand, some authors believe that the provisions of article 306 of Civil Procedure Code 1983 may apply to the recognition and enforcement of foreign judgments /awards as has been the practice of Sudan since its independence in 1956. The Sudanese government had taken the precaution of preserving the government's assets and property abroad.[152] *Hussein Awad Abo Elgasim*[153] ensured that many of the judges exercised their discretion in

[149] Hussein A. Elgasim, 'Arbitral Award', in Sudanese Judicial Judgment Journal (2009), SJJJ No 102

[150] Mohamed M. Adam (n84) 232; Ibraheim M.Draig (n89) 309

[151] Izaldin Abdulla, *International Private Law,* (2nd edn, University of Al-Nileen Library Press, 2004) 198

[152] Fath El Rahman Abdalla El Sheikh (n86) 127

[153] Hussein Awad Abo Elgasim (n111) 70

proceedings for recognition and enforcement of foreign arbitral awards. They treat foreign awards as foreign judgments, and thus they apply article 306 of the Act.

However, the specific performance of an award will not be ordered where there is a good reason for the order to be refused. For example, where an award ordered was illegal, and not merely for an unreasonable act, or where the award debtor delays the enforcement.[154] The plaintiff can ask for damages for failure to perform the award, or an injunction restraining the unsuccessful party from failing to comply with the award, or a Mareva injunction (a freezing order) to freeze assets of the respondent out of the jurisdiction.[155] It is a valid defence that the award has been varied by agreement or has been performed. Accord and satisfaction, as pleaded in *Smith v Trowsdale*[156] constitute a good defence.

It is no defence to an action on an award that there has been misconduct[157] or irregularity or a mistake on the part of the arbitrator[158], and, in these circumstances, the proper course is to have the award set aside. Misconduct does not result in the award being void, but merely voidable[159]. If the arbitration agreement does not provide for a time within which the award shall be made, it is not a good defence to an action on an award that it was not made within a reasonable time. The court also held that the principle (all things to have been done rightly) does not apply to proceedings of arbitration tribunals "the matters must be proved".[160] Despite all of this argument, however, an action for recognition and enforcement might be brought under the Arbitration Act 2016, or in the courts, which have been recognising and enforcing the domestic arbitral awards.

However, article 156 (e) of the Civil Procedure Code 1983, as well as article 42 (e) of the repealed Civil Justice Ordinance 1929, provide that a foreign award must not have been obtained by fraud. The issue of fraud may have been raised in the foreign court, but the foreign court refused it, or it is raised for the first time during the enforcement proceedings.

---

[154] *Mark Wood, Bart v Edmund Griffith*, Feb. 10, 11, 12, [1818]. [8. C. 1 Wils. Ch. 34 (award ordered was illegal, and not merely an unreasonable application of the Act)

[155] *Nickels v. Hancock* (1855) 7 De G M& G300 See also *Chichester v M'Intire* (1830) 4 Bill NS78

[156] *Smith v Trowsdale* (1854) 9 App Cas 605, in Sundra Rajoo (n52) 423

[157] *Mohamed Abdullah Tpe Abdul Majeed v Habib Mohamed* 119861 1 MI. 526; *State Government of Sarawak v Chin Hint Engineering Development Co* 119951 3 MI 237

[158] *Swinford v Burn* (1818) Gow 5; *Walshaw v Brighouse Corp* (1988) 2QB 286

[159] *Thorburn v. Barnes* (1986) LRCP384, approved in *Oppenheim & Co v Mohamed Haneef* (1922) I AC 482, PC; *Bache v Billingham* (1984) 1 Qb 107 at 111

[160] *Gisborne v Hart* (1839) 5 M & W 50

In either case, the Sudanese court will reopen the order. It is considered as an exceptional case to the general rule that the foreign judgment must be conclusive[161].

It is an established rule that a foreign judgment is impeachable on the grounds of fraud, provided that alleged fraud has been proved and cannot be enforced in Sudan. That is the same rule in domestic law by which the local court is entitled to refuse the enforcement of a judgment on the grounds of fraud. There are two types of fraud: [162]fraud on the part of the foreign court and fraud by a party to the case. If either type of fraud in a case is discovered later on by the Sudanese court, then it has the competence to investigate the fraud, and if it is proved, then, the Sudanese court will refuse the enforcement of the foreign award or judgment[163].

Since there is no Sudanese case available concerning the issue of fraud, it will be helpful to refer to an English case of *Price v. Dewhurst*[164]. Here the court herad a case wherby the executors of a will in England faced a challenge by members of the deaceased's family in Denmark who were not beneficiaries had attempted to obtain access to the deceased's estate by forming themselves into a 'court' under Danish law to handle the estate's finances. They misled the Danish court and obtained rights under Danish law. In the words of the then Vice Chancellor Sir Lancelot Shadwell:

> *"It appears to me….that this foreign judgment….is fraudulent and void"*."[165]

The English court thus refused to accept the validity of an overseas judgment where it could be shown that it had been obtained by fraud. Therefore. if the party to the dispute deceives the foreign court in order to attain gains, the Sudanese court will not recognise or enforce the award or judgment.

Briefly, if the judgment debtor succeeds in defence of fraud, whether fraud on the part of the foreign court or the part judgment creditor,[166] the courts in Sudan must reopen the dispute on its merits to determine whether there was a fraud or not.

---

[161] Barakat S. Mohammed, *Enforcement of Foreign Judgments in the Sudan*, (AL-Daar Al-Sudania, 2015) 389
[162] Akasha Mohamed, *International Civil and Commercial Procedure*, (1st edn, Daar Alnashir, 1994). 220
[163] Ibid
[164] *Price v Dewhurst* (1837) 8 Sim 279
[165] Ibid
[125] Ibid At page 308
[166] Ibrahim Draig (109) 76

5.9 The Method and Doctrine of Recognition and Enforcement as Applied

There are four principal modes for enforcing arbitral awards.[167] The first is where the award must be registered or deposited with the court and may be enforced if the court so judges. The second is where national law grants that, with the court's permission, the award may be enforced directly without the need to register or deposit it.[168] The third is where enforcement of an award involves bringing an application before the court to render an order for enforcement (known as exequatur). The fourth is to sue on the award as evidence of a debt.[169]

The Sudanese legislature has followed English law on this issue. Article 47 of the Arbitration Act, 2016, and article 308 of the Civil Procedure Act 1983 provides the mechanism of establishing a new action.[170] The foreign award or the order holder must apply to the court for granting an order to enforce the foreign award and under the law of Sudan or by the principle of a convention which Sudan has ratified. Thus, Sudanese law requires a new action to enforce foreign arbitral awards, as where the competent court considers the award to be an indication of an obligation, the grounds for recognition and enforcement would be the order of a national court. If, on the other hand, the national law requires registration for the enforcement of foreign awards, then enforcement depends on the foreign arbitral award being considered res judicata or contrasting the public policy. Consequently, a foreign award may not be enforced directly in Sudan unless the foreign judgment creditor institutes a new action based upon the foreign order, and the Sudanese court's order is merely for recognition and enforcement in Sudan[171].

It is clear from the provisions of the current Arbitration Act 2016 and the Civil Procedure Act 983 that the Sudanese legislature adopts the doctrine of surveillance since it imposes minimum legal restrictions to respect the principles of res judicata and public policy. Thus, a court has no right to consider the subject matter of the dispute unless it has the right to maintain the principle of public order and morality of Sudan and to refuse enforcement of an award obtained by fraud.

---

[167] A Redfern and M Hunter, *Law and Practice of International Commercial Arbitration*, (4th edn, Sweet & Maxwell, 2004) Paras 10-08

[168] The method adopted by English arbitration system. See the English Arbitration Act 1996, s66

[169] Redfern and Hunter (n 127) Para 10-08.2

[170] Kamil Idris (n28) 190

[171] Ibrahim Draig (166) 115

5.10 The possibility of Implementation of the New York Convention in Sudan

The current situation is that the Sudanese Arbitration Act 2016 applies to both domestic and international arbitration. There are two ways of enforcing arbitral awards in Sudan: first, foreign (non-Convention) arbitral awards can be enforced under the provision created by article 48 of the Arbitration Act 2016. Article 48 (e) grants recognition of foreign arbitral awards that rendered and requested any country enforcing Sudanese court judgments, centres and tribunal awards in its jurisdiction, or by the judgments and conventions ratified by Sudan. Such a country must have a reciprocal regime for enforcing judgments made in Sudan. A foreign award creditor is required to apply[172] to the court and upon presentation of the duly proved original award and an authentic copy thereof, the original arbitration agreement, and the award debtor having been notified and that the award, or any part of it, is not contrary to public order in Sudan.

Second, the enforcement of foreign arbitral awards in Sudan by international conventions and regional treaties relating to the enforcement of foreign judgments and awards which Sudan has joined. For example, the Riyadh Convention, the Convention of Enforced Awards between the Conditions of the Arab State, states that each contracting state should create a specialised judicial body before which enforcement order of the awards and its procedures may arise, and all contracting states should be notified regarding this issue.[173] This Convention came into force as a consequence of the ratification by Arab governments to promote the enforcement of arbitral awards between themselves and as an aim of the Second Article of the Arab League State's Convention[174]. Sudan also ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID). This may indicate Sudan's ability to process and abide by these Conventions in matters relating to the enforcement of foreign arbitral awards. It should be borne in mind that to achieve conventional award enforcement in Sudan, it must comply with Islamic public policy. However, the ratification of the New York Convention of 1958 has always been questioned by subsequent governments.

However, the current mechanisms of enforcement of arbitral awards in Sudan pose several concerns and risks to investors, including the following.

[172] Arbitration Act 2016, Art 42
[173] Article (8) of the Riyadh Arab Agreement for Judicial Cooperation, 6 April 1983.
[174] See Article 2 of the Arab League State's Convention

Non-implementation of multilateral treaties and international conventions. Although Sudan has ratified various international conventions and treaties related to the enforcement of foreign arbitral awards,[175] there is still a high degree of hesitation regarding the implementation of those instruments; mainly, the New York Convention. Also, Sudan has not adopted modern arbitration legislation based on the UNCITRAL Model Law 1985 on International Commercial Arbitration. Therefore, that makes enforcement of arbitral awards difficult in this country. However, this situation will attract a lot of criticism from the international arbitration community for refusing to implement the New York Convention[176]. However, it is confusing that Sudan was one of the first states that were a signatory to the International Centre for Settlement of Investment Disputes. (ICSID or the Centre), and ratified and implemented the Convention in 1973.[177] ICSID has been criticised and described as an international instrument initiated to support transnational investments and curb governmental behaviours against foreign investors.[178]

Sudanese law did not set a specific period for the procedures for enforcing foreign arbitration awards[179]. The amount of time required to enforce arbitral awards varies significantly between Sudan and the country in which the award was rendered. In many cases, enforcement actions can take many years before a final settlement is achieved.

Political circumstances are also an issue. There is a risk in Sudan that the courts may be reluctant to enforce arbitral awards that conflict with government interests. However, the level of risk represented is dependent on the type of award enforced and political relations with the country where the arbitration takes place.

The Sudanese courts mostly interpret the matters of unfairness and the lack of due process as authorising the application of the public policy or Islamic law (Sharia) as a ground for refusal, which has limited the enforcement of any foreign arbitral awards[180]. For example, in the case of *Nile Inter Trade v. Atcoco for Advanced Trading and Chemical Works Co. Civil Recourse* [181], the High Court nullified the award on the ground of violation of Sharia

[175] Draig (n54)
[176] Interview held with the Lawyer Dr Mohammed Alhafiz at his Khartoum office in 20 September 2019
[177] On April 1973, Sudan ratified the ICSID Convention. See the ICSID database at: https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx (accessed on 12 April 2018).
[178] Schereuer, *The ICSID Convention: A Commentary*, (Cambridge University Press, 2001) 4–5.
[179] Dr Mohammed Alhafiz (n176)
[180] Izaldin Abdulla, International Private Law, (2nd edn, University of Al-Nileen Library Press, 2017) 187
[181] *Nile Inter Trade v. Atcoco for Advanced Trading and Chemical Works Co.* (2006) Civil Recourse No. 310/2006, (unpublished) cited in Concluded Arbitral Principles (2008), Sudanese House for Books, p148

principles. Besides, the lack of court jurisdiction to rule the enforcement application creates a public policy ground for refusal.

The New York Convention was concluded in 1958 by the United Nations to govern the recognition and enforcement of foreign arbitral awards. Currently, some 166 countries have ratified the Convention, combining the largest significant trading states and many newly born countries from all areas of the world.[182] The New York Convention has been widely considered as a landmark in international commercial arbitration. It was explicitly adopted to promote the recognition and enforcement of foreign arbitral awards[183]. Notwithstanding the shortness of the New York Convention (it carries some substantive provisions); it is now popularly considered as the "cornerstone of international commercial arbitration."[184]

A foreign arbitral award can be enforced in Sudan under the New York Convention made applicable by Article 48 (e) of the Arbitration Act 2016, which states that:

> *"The country where the award is issued and requested to be executed is executing Sudanese courts judgments, centres and tribunal awards in its jurisdiction, or by the judgments, conventions ratified by Sudan." [185]*

While article 48(e) of the Arbitration Act 2016 holds the principles of reciprocity and judicial reservations provided by the New York Convention[186] with the current 159 contracting states, reciprocity, and judicial reservations under the Convention have practical importance, mainly to the effect that Sudan does not receive reciprocity concerning the enforcement of awards rendered in Sudan from the other contracting states[187]. Also, commercial reservations would not have any practical significance, as there is no definition of 'commercial' under section 48(e) of the Arbitration Act 2016. Apparently, it is provided to include all practice of commercial activity entered into international trade. However, some difficulties might arise if the commercial reservation is applied in the Sudan, where the enforcement is requested. The commercial reservation indicates that the Convention applies exclusively to disputes of a commercial nature. It raises some issues in this regard, as an enforcement application might be considered to be a commercial transaction in some states and might not be considered as such in Sudan.

---

[182] Albert Berg, *The New York Arbitration Convention of 1958*, (3rd edn, Kluwer Law International, 1993) 19
[183] Ibid
[184] ibid
[185] Arbitration Act 2016, Art 48 (e)
[186] The principle of reciprocity in enforcing foreign awards is a reflection of Article I (3) of the New York Convention
[187] Izaldin Abdulla (n180)

Article 1 (3) of the New York Convention limits its application to disputes arising out of commercial transactions, which means that the courts in the Contracting States that authorise this reservation will have to review the transaction under their legal systems to determine whether it is to be considered 'commercial' or not. However, the principle of the commercial reservation is supported by 48 out of 159 contracting states of the New York Convention.[188] The commercial reservation is not fully adopted, and even countries that accepted it use the term "commercial" extensively. It thus does not significantly hinder the effectiveness of the New York Convention.

However, in practice, the commercial reservations may not create a challenge as the courts in different states are expected to interpret the scope of the term "commercial" widely[189]. In Sudan, which had not declared any of the commercial reservations, the award should be enforced before the competent courts irrespective of whether the country where the award was rendered even regard the transaction as a commercial or not[190].

This researcher attempts to bring together some connecting factors that may facilitate the enforcement provisions of the New York Convention in Sudan. The most significant factor that connects Sudan to the New York Convention is the interpretation Sudanese courts give to the law. Some principles and rules are very similar to the rules of the New York Convention, but the incorrect interpretation often used by the courts will make it challenging to implement the foreign arbitration awards under the New York Convention. In an unusual move, some of the courts have started to change their attitude and to interpret the Arbitration Act differently. Also, under the Sudanese Investment Act 2015[191], the parties are free to hold arbitral clauses in those agreements which are international. Under article 34, the Arbitration Act 2016, the parties are free to refer future disputes to arbitration. They are free to select their arbitrators and to proceed with their arbitration agreements.

Implementation of the provisions of the New York Convention regarding enforcement of foreign arbitral awards should not be problematic in Sudan as there are many similar grounds and principles found in both the New York Convention and Sudanese Arbitration Law. For example, under article V (1) New York Convention[192], an award is final, and binding. Article

[188] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last accessed 13/11/2019).
[189] Abdul Hamid El-Ahdab, Arbitration with the Arab Countries, (3rd edn, Kluwer Law International, 2011) 209
[190] Barakat S. Mohammed, (n161) 188
[191] Investment Act 2015, Art 32(a)
[192] New York Convention 1958, Art V (1)

49 of the Arbitration Act 2016 states that; '*No order passed by the competent court to execute the Arbitration award shall be appealed against.*'[193] The award under this provision is also binding and not subject to appeal, and final. Therefore, the court before whom enforcement is applied may enforce the award under Article V (1) of the Convention provided a court nullification request has not been filed.

However, the grounds for nullification of an arbitral an award under article 42 of the Arbitration Act 2016 are almost the same as article V of the New York Convention, while the grounds for challenging the enforcement request are entirely different from those in article V of the New York Convention. Besides, the grounds for challenging the enforcement of foreign arbitral awards that are governed by foreign arbitration law are also not compatible with article V of the New York Convention[194]. Therefore, it could be suggested that the Sudanese legislature should regulate the recognition of foreign arbitral awards according to the relevant national law, without there being a necessity to distinguish between the grounds to challenge the enforcement application and the grounds to set aside the award. Both should be comparable to article V of the New York Convention and articles 34 and 36 of the Model Law.

Moreover, accession and ratification were made without reciprocal reservation, as was the case with many contracting states to the New York Convention. Accordingly, the Sudanese courts are not competent to refuse enforcement of any foreign arbitral award in Sudan based on the principle of reciprocity[195]. Besides, the New York Convention's article 1 (2) states that arbitral awards include those issued by arbitration institutions under article 48 of the Arbitration Act 2106 are now enforceable in Sudan. However, no foreign arbitral award has been enforced in Sudan since March 2017.

Under article 8 of the Arbitration Act 2016, the requirement for the arbitration agreement to be in writing is satisfied by several forms of the agreement; in writing such as messages, mail documents or electronic communication.[196] This can be considered as a more progressive approach than article II (2) of the New York Convention which did not clearly state that the term "agreement in writing" shall include an arbitration clause in an arbitration agreement or

[193] Arbitration Act 2016, Art 49
[194] Dr Mohammed Alhafiz (n179)
[195] Interviewed Mawlana Dr Abdullah Dirar, the Head of Arbitration Unit in the Court of Appeal, 2nd of October 2019
[196] Article 8, Arbitration Act 2016

included in an exchange of letters or messages.[197] The Sudanese arbitration law is much more forward looking on this issue.

The grounds for refusal of enforcement of foreign arbitral awards are as follows: incapacity of the arbitration tribunal, the invalidity of the arbitration agreement the arbitrator exceeding his jurisdiction, non-binding awards, due process, public policy and the principle of reciprocity.[198] The first subsection of article 48 of this law mentions "*No execution of the award of a foreign Arbitration Tribunal shall be made, before Sudanese courts, save after verifying the satisfaction thereby of the following conditions*." This means that as Sudanese law has consented to the different types of refusal on grounds stated in Article V of the New York Convention, its provisions come within this article. However, certainty is still lacking as to whether the court will consider article V of the New York Convention or the provisions of article 48. This is because Sudan lacks international case law subsequent to the issuance of this Act[199].

The implementation of the New York Convention in Sudan is faced with challenges. The extended use of the public policy argument, including the unclear use of Sharia public policy in the Sudanese arbitration system is one of the barriers adversely affecting the effectiveness of the implementation of the New York Convention in Sudan[200]. However, if Sudan decides to adopt the New York Convention fully, there is an urgent need to amend her arbitration laws that take into account primary principles of arbitration as a method for dispute resolution.

In light of the current situation in Sudan, some recommendations can be made. The parties wishing to arbitrate in Sudan (either regarding domestic or foreign disputes) should agree on the Arbitration Rules in Sudan[201]. This is to ensure the applicability of the New York Convention implementing the declaration regarding the recognition and enforcement of arbitral awards as authorised by the Sudanese judiciary. For example, if the foreign award creditor seeks to enforce an arbitral award in Sudan, they face domestic legislation and will struggle with the national rules and more. This is not the end of the story, as the Sudanese arbitration system may have different grounds for refusal other than those identified in Article V of the New York Convention and articles 34 and 35 of the Model Law.

[197] Article II (2) of New York Convention
[198] Article 48, Arbitration Act 2016
[199] Kamil Idris (n170) 198
[200] Mawlana Dr Abdullah Dirar (n195)
[201] Ibid

5.11 The Problems that may limit the Implementation of the New York Convention in Sudan

There are a range of obstacles that the implementation of the New York Convention faces in Sudan. The operation of the New York Convention at a national level may demonstrate a more significant challenge than expected. After the ratification of the New York Convention, Sudan did not amend her arbitration law to it take into account[202]. This circumstance has created various difficulties connected with understanding the legal context governing the recognition and enforcement of foreign arbitral awards. This has been further complicated by the local standards applied by many national courts in their judgments on foreign arbitral awards[203]. For example, ratification of a convention by Sudan would require an obligation upon it at an international level. However, it would not affect the country's domestic law unless the legislature set domestic law that has an impact on the adopted Convention at a domestic level. In an advanced legal system, international law is isolated from national laws[204]. It does not have an effect on the rights and obligations at the national level unless domestic legislation was issued to give effect to the international law in the internal legal systems[205]. Sudan should thus modernise her arbitration system and bring them in line with the New York Convention and Model Law.

Therefore, the Sudanese arbitration laws are not based on or inspired by the Model Law. Instead, they are outdated and influenced by the system of the past and neglect most of the advantages of the development of arbitration as a method of dispute resolution. For example, the problem in Sudan is that the new arbitration law does not clarify the application of the rules of the Islamic legal tradition.[206] Also, the form of an arbitration agreement is not defined, the integrity of the arbitral award on the subject of the dispute is not identified, the principle of party autonomy in determining the law and rules governing the arbitration proceedings is not well provided, and the principles of separability of the arbitration agreement and competence (the tribunal has jurisdiction to decide on its jurisdiction) are not allowed in Sudanese arbitration law. Besides, these uncertainties, and the unpredictability of the court verdicts on foreign arbitral awards, confirm the struggle in allowing the New York

[202] Dr Mohammed Alhafiz (n179)
[203] Farah, Mohammad A *The Necessary Substantive rules for an Arbitral Award*, (Khartoum University Press, 2017) 312
[204] Muawiya O. Al - Haddad, *The Intervention of the Sudanese judiciary in Arbitration Assistance and Supervision*, (Dar El-Nahir Press, 2017) 161
[205] Dr Mohammed Alhafiz (n202)
[206] Muhsin Shafieg, *International Commercial Arbitration. A study in the Law of International Commerce*, (Dar Al Nahda AL Arabiya, 2015) 324- 326

Convention as the main convention governing the recognition and enforcement of foreign arbitral awards in Sudan.[207]

Another problem associated with the public policy defence as a ground for refusal is that it may limit the implementation of the New York Convention. Most of the court judgments on foreign arbitral awards in Sudan result in the rejection of enforcement of the foreign award because of the stringent consideration of the national public policy as a ground for refusal.[208] Refusals are also connected with Islamic public policy in Sudan. Besides, the results of the interview study carried out for this research revealed that public policy, including the Islamic public policy of Sudan, is a barrier to the recognition and enforcement of foreign arbitral awards. Therefore, the research studies the public policy notion as applied in Sudan and contributes not only to the literature on the implementation of the New York Convention but also to deliver comment on the thought of public policy as a safeguard toward international standards in the more extensive private international law.

However, the lack of knowledge of the Sudanese judiciary regarding arbitration, and the New York Convention, in particular, is regarded as a barrier to the recognition and enforcement of foreign arbitral awards. Most of the Sudanese courts' rulings on foreign arbitral awards raise critical concerns about the destiny of the recognition and enforcement of foreign arbitral awards in Sudan. In some cases the national courts have breached the fundamental principles that the New York Convention is formed upon; an excellent example of the strange principles practiced by some national courts in continuously refusing the recognition and enforcement of foreign arbitral awards because the arbitral award has not been rendered under Sudanese law or in accordance with the sharia principles.[209]

Another form of this problem correlates to the truth that most of the national court decisions on foreign arbitral awards do not refer to the New York Convention or its internationally received features such as pro-enforcement preference, conservative interpretation of the refusal grounds, and private grounds for refusal[210]. These exist several other indications of

[207] *American International Contracting Co Ltd v. Ahmed Kamel Hodaib* (2017) GTA /T /402 Journal of Judicial judgments and Legislation, (2018) 103

[208] Muhsin Shafieg, (N1) 304 , see also *African Integrated Investment Group Co., Ltd. v. Burhan Rashid and Hani Matoug* No; M A/TM//624 2001 (Sudanese Appeal of Court 3 May 2001)

[209] In the case of *The Owners of Ship 'Arab Cooperation' v the Owners of the Ship 'Sheba'* GTA / TM / 2017, the court held that ' it was noted that the arbitral tribunal referred to the texts of several international laws that are not recognized by Sudanese law, so the topic court had to verify It is correct to apply these laws .... The court's competence to supervising the arbitral tribunal in its application of any of the laws'.

[210] Mawlana Dr Abdullah Dirar (n195)

this problem, such as missing the procedural rules determined by parties to consider a procedural mistake and annulling a foreign arbitral award instead of refusing its enforcement.

5.12 Conclusion

International Conventions and bilateral treaties are the fundamental mechanisms for the recognition and enforcement of foreign arbitral awards. Thus, the New York Convention is of the most importance. Therefore, the provisions for enforcement of the foreign award in Sudan require knowledge of international conventions and multilateral treaties to which the country is a party. Mainly, it is essential to consider the grounds for refusing to recognise and enforce foreign arbitral awards stipulated in these conventions and treaties.

It is also necessary to investigate Sudanese arbitration law as several international conventions, including the New York Convention 1958, provide the forum state with the option to the national courts to recognise and enforce foreign arbitral awards. For example, it is the domestic law of the forum state that decides the party's capacity to conduct an arbitration agreement and set rules for the formation of the arbitral tribunal and the arbitration proceedings[211].

Also, national laws play as tools for implementing and interpreting international conventions[212]; therefore, particular consideration should be given to the provisions of Sudanese law regarding enforcement and the foreign arbitral awards. Sudanese law is in need of assessing its provisions to comply with the norms established by the international practice of arbitration.

This chapter examined the recognition and enforcement of foreign arbitral awards under Sudanese law critically. It was assumed that, under the Civil Procedure Code 1983, foreign arbitral awards were open to questions and challenges. This was because, in the foregoing arbitration provisions stipulated by the Civil Procedure Code 1983, there were no rules and regulations, which dealt with the recognition and enforcement of foreign awards in Sudan. It was difficult for Sudanese courts to recognise or enforce any foreign arbitral award. The problem lies in that awards which were rendered in Sudan are challenging when it comes to enforcement. Also, the Civil Procedure Code 1983 is believed to be inadequate, and it

[211] Muawiya O. Al – Haddad (n204)
[212] Mawlana Dr Abdullah Dirar (n210)

contains complex expressions such as ‘judgment’ instead of awards. One of its weaknesses is that it did not provide for any definition of ‘arbitration’, whether of an institutional or an ad hoc nature. It also does not define arbitrators. The Act was not well drafted either in regard to arbitration agreements, as it also failed to provide the written requirements. Furthermore, they did not refer to the principle of autonomy in the agreement. Moreover, challenges to the arbitral awards also are discussed in this law of procedures, which are similar to those of appeals in the Civil Court.

It is quite clear that such a problem adversely affected the investment environment in Sudan. Nevertheless, the situation examined in this chapter showed that the Sudanese legislative authorities tended to grant permission to enforce such awards by establishing two Arbitration Acts in 2005 and 2016, over a relatively short period.

There is a critical problem with the Arbitration Acts 2005 and 2016, as well as in the Civil Procedure Code 1983, regarding enforcement. They deal with foreign arbitral awards such as foreign court judgments. Therefore, a different system should have been devised for commercial arbitration.[213] Moreover, because the current Act did not consider a difference between foreign arbitral awards and court judgments, issues particular to foreign awards are not adequately addressed in Sudanese law. Thus, facilities reserved for enforcing foreign awards in most advanced arbitration systems are not provided for under Sudanese arbitration laws.

Under Article VII (1) of the New York Convention, the national courts have the discretion to apply the most appropriate law or Convention for enforcing a foreign arbitral award. As a result, the Convention establishes the principle of "the most appropriate law" that provides options.

The national law determines the grounds for revoking foreign arbitral awards at the seat of arbitration court or the applicable law. Therefore, it is essential to consider the grounds for revoking the foreign award rendered in Sudan. Nullifying a foreign award in Sudan may lead to the refusal of their enforcement in Sudan.

The advanced mandatory rules of law in Sudan are essential, not only when Sudan is the seat of arbitration, or when enforcement of the foreign award is sought in the country, but also when Sudanese law is preferred by the parties to rule their disputes, or when there is a close

[213] Kamil Idris (n170)

connection between Sudan and the dispute[214]. This is because it recommends that the mandatory rules of those states with a dispute related relationship may be relevant.

It is agreed that the New York Convention is one of the pillars of international commercial arbitration. The progress of modern arbitration developed as a result of the broad acceptance of this Convention and the UNCITRAL Model Law. Notwithstanding the efforts at improving the arbitration law and practice in Sudan, the country has not yet implemented the New York Convention, although Sudan ratified the Convention in March 2018. Dr Darraj[215], the chair of the drafting committee of the Sudan Arbitration Act 2016, found no reason for Sudan not to implement the Convention.

However, Sudan has ratified some regional and international conventions, and it is still difficult to enforce foreign arbitral awards in Sudan, particularly in situations in which the contradiction of Islamic principles and secular laws Islamic takes place. Also, the ratified conventions and treaties have not been integrated into the Sudanese Arbitration Acts. Thus, there is still a gap in the law governing arbitration that needs significant progress with regards to foreign arbitral awards.

Although the Sudanese Arbitration Act of 2016 provides that a foreign arbitral award should not be enforced when it violates the Sudanese law; for example, when the award is in contradiction with Sudanese public policy or public morality. Therefore, Sudanese arbitration law should be more attractive to foreign investors since parties believe that, in the event of any disputes arisen within their commercial contract, their foreign arbitral awards will be recognised and enforced by courts without creating conflicts between the courts and arbitrators.

It can be argued that the Sudanese arbitration system has moved towards creating facilitative conditions for recognition and enforcing foreign arbitral awards. However, some amendments are necessary to bring the Sudanese Act in line with advanced dispute settlement systems, and to fit for the needs of commercial arbitration. The first step, in this regard, should be reformulating the legislation and carefully addressing foreign arbitration as being different from foreign court judgments and orders in respect.

[214] Ibrahim M. Draig, *Explanation of Arbitration Law 2016*, (1st.edn, AL Daar AL Sudaniya, 2017) 203

[215] Ibid page 229

Chapter 6 Conventions and Multilateral Treaties for the Enforcement of Foreign Arbitral Awards Ratified by Sudan

6.1 Introduction

The dependence of the international arbitral process upon national systems of law is most clearly seen in the context of the recognition and enforcement of foreign awards.[1] An arbitral tribunal is limited in power that it can exercise and such powers as are adequate for resolving a particular dispute, but which fall short of the coercive powers possessed by federal courts, is the arrangement in many countries. The detailed procedures adopted by these courts vary from country to country.[2] However, the effect of international conventions, and in particular, the New York Convention, has been to secure a significant level of consistency in the recognition and enforcement of awards in most of the larger trading countries in the world.

The main transnational Conventions that deal with the recognition and enforcement of foreign awards are examined in this section. In particular, this chapter includes a discussion of the New York Convention, the ICSID Convention, and the Geneva Convention. In this section, there is also a brief discussion of several regional conventions, such as the Amman Arab Convention on Commercial Arbitration and the Riyadh Arab Convention on Judicial Cooperation 1983. The application of these regional conventions is far more limited than the application of the New York and ICSID Conventions because the New York Convention applies to almost all disputes, overriding those regional conventions.

6.2 Whether Sudan is still a Member to the New York Convention, or not

The issue of Sudan's accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958 (otherwise known as the New York Convention) has not yet been definitive or confirmed by the Sudanese judicial bodies, and there continues to be an intense debate on the issue. Sudan ratified the Convention in March 2018; but the government did not make any declarations,[3] notifications or reservations in regard to the application of the Convention. Also, the national courts have not yet dealt with any disputes under the New York Convention. Doubts, therefore, exist whether the New York Convention will have any legal effect in the Sudanese judicial system as it was just a formal acceptance

[1] Redfern and Hunter, *International Arbitration,* (6th edn. Sweet & Maxwell, 2015) 617

[2] ibid

[3] Sudan still not yet announced its formal ratification or accession to the New York Convention. Also, there is no confirmation within the judicial bodies that Sudan has agreed to join the New York Convention.

rather than the ratification of the Convention by Sudan. The reason behind this is that neither the Ministry of Justice, nor the Chief of the Judiciary has empowered the courts to apply the Convention in the Sudanese judicial system, and the authorities did not formalise the acceptance of the Convention. It appears that the procedures that preceded Sudan's accession to the New York Convention were not agreed to or ratified by the President of Sudan and the National Assembly, which usually, undertakes the study and review of any proposal for ratification of a Convention or a treaty.

Furthermore, an accession document must be submitted to the President of the State for his final approval. Article 58 (k) of the Sudanese Constitution states:

> "*The President of the Republic directs and supervises the foreign policy of the state and ratifies international treaties and agreements with the approval of the National Legislative Body and the National Assembly.*"[4]

Therefore, the procedures that were followed for Sudan's accession to the New York Convention failed to comply with the provisions of the constitution, and the process that was taken was different from that Sudan usually adopts in ratifying international conventions, treaties, or regional agreements**.**

This situation has created a dilemma between Sudan and the international arbitration community, in addition to reducing the confidence of foreign investors in the Sudanese judicial system. It may also raise a problematic legal challenge; whether Sudan is still a Contracting State Member of the New York Convention, or not.

In this regard, this researcher interviewed the Under-secretary of the Ministry of Justice, *Mowlana Sawsan Shandi* [5] who strongly denied Sudan's accession to the Convention and clearly stated that: "*the Ministry of Justice (which usually has the duty to applying for accessions to treaties and conventions) did not deposit its instrument of accession to the Secretary-General of the United Nations to join the New York Convention, nor did the Law Commission or anyone do so. Furthermore, it was an individual act of one of the members of the Sudanese embassy in New York.*"[6] Accordingly, she affirmed that Sudan is not party to the New York Convention, and the national courts have no jurisdiction to hear any case related to the provisions of that Convention.

[4] Sudanese Constitution 2005, Art 58 (k)
[5] Interview held with the Undersecretary of the Ministry of Justice, Mowlana Sawsan Shandi at her office in 24 September 2019
[6] Ibid

Furthermore, *Mawlana* Dr Abdullah Dirar,[7] the Head of Arbitration Unit in the Court of Appeal, explained that:

> '*The appeals courts have not yet proceeded with any application regarding enforcement of foreign arbitral awards based on the rules of the New York Convention, the reason for this is that Sudan's membership to the New York Convention has not yet been confirmed*.'[8]

However, Sudan fulfilled all the conditions for accession and became the 159th Contracting State to the New York Convention. By virtue of article XII (2)[9] of the New York Convention, it came into force in Sudan commencing in July 2018. Accordingly, Sudan has been placed on the list of the Member States of this Convention. Therefore, this researcher found it necessary to alert the legislative and executive bodies that this critical issue must be addressed by the National Parliament as soon as possible.

This researcher held two seminars in Khartoum in August and December 2019[10] to discuss aspects of the dilemma with decision-makers in the judicial and executive bodies. The outputs of those Seminars were, in summary, that in depositing its instrument of accession to the Secretary-General of the United Nations to join the New York Convention, an irregular act was carried out by one of the Sudanese diplomatic corps in New York, and that the government of Sudan refused to acknowledge Sudan's membership in the New York Convention. Therefore, Sudan may denounce this Convention under Article XIII (1) of New York Convention,[11] by written notification to the Secretary-General of the United Nations. Denunciation which would take effect one year after the date of receipt of the notification by the Secretary-General.

6.3 The Approaches of the Sudanese Constitutional policies to International Conventions and Treaties

It is one of the fundamental objectives of the Constitution to determine the rights and duties of the individual and to establish justice and equality determining those rights and duties. The constitution of Sudan is deemed as the State's primary document, stipulating the guiding

[7] Interviewed Mawlana Dr Abdullah Dirar, the Head of Arbitration Unit in the Court of Appeal, 2nd of October 2019
[8] Ibid
[9] Article XII (2) of the New York Convention 1958
[10] The attendees of these seminars included high ranking officials from the Sudanese Bar Association, the Ministry of Justice, the Judiciary Authority, academics, and those interested in the issues of arbitration.
[11] Article XIII (1) of the New York Convention 1958

policies of the state system.[12] However, the Sudanese Constitution needs to be extended to allow more public participation within an elected government and parliament[13]. It should also set out the fundamental features of the Permanent Constitution of Sudan 2005. It is based on the African, Arabic and Islamic world cultures, including the features of the Islamic and Christian religions[14].

The Sudanese Constitution did not provide for specific reference or provisions for arbitration until the Arbitration Act 2005 was enacted. However, according to article 33, the State respects international treaties and conventions[15]. It works to implement all the agreements and international conventions and treaties which have been ratified by Sudan, but as explained above the so called ratification procedure was carried out by a diplomat who had not been given the consent of the Ministry of Justice and President of Sudan.

The Constitution has maintained in more than one article the commercial relations principles; such as guarantees, the rights, freedoms, justice, and sovereignty of the law to protect the citizen. 'It also encourages working to consolidate cooperation and call for unity and collaboration through international and bilateral treaties with the demonstration of new commercial relationships between Sudan and all countries'.[16]

The Constitution stipulates in article 27(3) that:

> *"All rights and freedoms enshrined in international human rights treaties; covenants and instruments ratified by the Republic of Sudan shall be an integral part of this Bill."* [17]

The Constitution also provides that the foreign policies of Sudan shall follow the national interest and shall be directed independently and transparently, with the consideration of the development of international cooperation. Particularly within the United Nations community and other international and regional organisations, to consolidate universal peace, respect for international law, convention obligations and raising a just world economic order.

---

[12] Al-Bashir A. Awooda, *Enforcement of Foreign Judgement and its Effect*, (2nd edn. Khartoum University Press, 2013) 286

[13] Faisal Kutty, 'The Shari'a Factor in International Commercial Arbitration', 28 Loy. L.A. Int'l & Comp. L. (2006) 67

[14] Ibid

[15] Abdul Hamid El-Ahdab, *Arbitration with the Arab Countries*, (3rd edn, Kluwer Law International, 2011) 319

[16] M. Taha, Abosamra. *Arbitration in Boot, Sudanese Law Reform*. AL Daar AL Sudaniya, Khartoum. (2005) 51

[17] Sudan Constitution 2005, Art 27 (3)

The Constitution also provides instructions to achieve Arab and African economic unity, each within the regional strategies and discussions as well as increasing African and Arab economic integration. Furthermore, Article 17 requires that the State must play a significant role on the enhancement of respect for human rights and show substantial progress in regional and international conferences, the improvement of exchange between civilisations and the establishment of an international rule-based system of justice and universal human dignity.

As for the principle of respect for the inviolability of rights, article 48 of the Constitution stipulates the following:

> *" Subject to Article 211 herein, no derogation from the rights and freedoms enshrined in this Bill shall be made. The Bill of Rights shall be upheld, protected and applied by the Constitutional Court and other competent courts; the Human Rights Commission shall monitor its application in the State under Article 142 herein."* [18]

These constitutional principles exist to ensure the protection of the people of Sudanese nationality, and also provided the protection of acquired rights of Sudanese people in Sudan or abroad. The provisions are explicit in the Civil Procedures Act of 1983, which has been explained in detail at an earlier stage of this chapter.

The text in article 2 reads as follows:

> "*The State is committed to the respect and promotion of human dignity, and is founded on justice, equality and the advancement of human rights and fundamental freedoms*." [19]

The Constitution also predicated in article 4 sc. (A) upon and guided by the following principles:

> "*the unity of Sudan is based on the free will of its people, the supremacy of the rule of law, decentralised democratic governance, accountability, equality, respect, and justice"* [20]

Article 5 of the Constitution provides for the sources of legislation and indicates that Islamic Sharia is the primary source of it. The Constitution confirmed the inevitability of dealing with the conditions and provisions stipulated in the conventions and treaties as part of the

[18] Constitution of Sudan 2005, Art 48

[19] Constitution of Sudan 2005, Art 2

[20] Constitution of Sudan 2005, Art 4 (a)

provisions of the Constitution.[21] The Sudanese Constitution has been concerned with international conventions and treaties and has given them considerable attention.

Moreover, the Constitution assigned the task of openness, entering, and dealing with international conventions and treaties to an independent body, namely, the National Council of Ministers[22]. In this regard, the legislator provides authorised legal exceptions and granted immunity to all decisions of the national legislative body that manages conventions and agreements independently. Its procedures and decisions should be final and not subject to amendment, appeal, or annulment.

It is clear that the Sudanese Constitution of 2005 has set out the criteria for the conditions and decisions stipulated in the international and bilateral conventions and treaties to which Sudan is a party. That shows the stable position of the Constitution in recognition and enforcement procedure and articles of the international convention.

6.4 Recognition and Enforcement under the New York Convention 1958

During the second decade of the United Nations (1956-65), many states nationalised foreign assets[23]. The relevant method of resolving disputes between the parties evolved for two purposes: by virtue of having established commercial markets they became engaged in transnational business enterprises which would sometimes involve resolutions of commercial disputes; and this type of trade activity also required the development of a robust dispute settlement system, whether by court process or by arbitration.[24] Most disputes between parties in different states arose from breaches of contracts, mostly with regard to private foreign investments between rich and poor states or in relation to shipping or procurement contracts[25]. It is also vital to note that the New York Convention was the first convention for the settlement of the dispute between states, and despite the controversial article V, it received support from many countries.

[21] The Constitution grants full presidential discretion to the President of Sudan to approve and decide in the matter of the conventions and treaties that has been ratified by Sudan, without prejudice to the provisions of the constitution. See Article 58 (A)

[22] Al-Bashir A. Awooda (n12) 14

[23] Personal interview and discussion with Professor Chatterjee, regarding Recognition and Enforcement under the New York Convention 1958, London 23 May 2017

[24] Ibid

[25] Adam Samuel, *Jurisdictional Problems in International Commercial Arbitration*. (Publications of the Swiss Institute of Comparative Law, 1990) 349-356

The New York Convention has an extensive application. In general, it eases the recognition and enforcement of foreign arbitral awards in the 159 Contracting States, regardless of the arbitration rules under which the proceedings are conducted.[26] It promotes a firm pro-enforcement policy provided by article I (1) of the New York Convention which states that:

> *"This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement is sought."* [27]

This provision clarified that the Convention refers to arbitral awards that were rendered in one state which is then recognised and enforced in another. The New York Convention does not set requirements for the recognition and enforcement of the award of a country that has not ratified to the Convention. An arbitral award may be rendered in a country that has not subscribed to the Convention and is recognised in another contracting state. In this situation, the provisions of the New York Convention may apply[28].

The New York Convention provides for the recognition and enforcement of foreign arbitral awards by national courts, subject to a handful of procedural and practical grounds for objecting to enforcement. This Convention provided, inter alia, for the protection of the assets of private foreign investors [29] and for payment of compensation to these investors.

As far as recognition is concerned, a state bound by the Convention undertakes to respect the binding effect of awards to which the Convention applies.[30] As far as enforcement is concerned, a state that is a party to the Convention undertakes to enforce awards to which the Convention applies, by its local procedural rules. It also undertakes not to impose substantially more onerous conditions, or higher fees or charges, for enforcement[31] that are imposed in the enforcement of its domestic awards. Under the New York Convention, recognition and enforcement of awards are usually considered as the first step before enforcement.

---

[26] For example, the ICC Rules, the LICA Rules, UNCTRAL Rules, or ICSID Additional Facility Rules

[27] The New York Convention 1958, Art 1 (1)

[28] Born, G, *International Commercial Arbitration,* (Kluwer Law International, 2014) 278

[29] The New York Convention 1958, Art III

[30] Redfern and Hunter (n1) 619

[31] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration*, (3rd ed. Sweet and Maxwell, 1999) 11-10

Article III (1) of the New York Convention states that: "*each contracting state shall recognize arbitral awards as binding.*"[32] Nevertheless, it may not be sufficient to examine simply whether a country has ratified the New York Convention or not when outlining enforcement procedures.

Furthermore, the ambiguity in articles VII (1), V (1) (e)[33] have led to the creation of two distinct procedures when it comes to enforcing arbitral awards which have been nullified by the seat country's court. The first is the traditional method based on article V (1) (e), which supports the enforcement court is not enforcing a foreign award nullified by the seat court[34]. The second is based on Article V (1) of New York Convention, which is based on the strict interpretation of Article VII (1) is also supported by the argument for distinguishing between international and domestic rules.

It may be commonly believed that the system set by the New York Convention permits the enforcement court not to enforce an award nullified in the country of origin. This is because article V includes the nullified awards rendered by the seat country's court as a ground for refusal[35]. Indeed, by enabling the enforcement court to refuse enforcement of such an award, article V (1) (e) forms a hypothesis that revoked awards are not enforceable foreign awards.[36] Article V (1) provides an *inter alia* that: "Recognition and Enforcement may be refused...". Thus the New York Convention opens up the possibility of national courts where enforcement is required to exercising their discretion in enforcing an award that has been revoked by the seat court. Besides, the primary purpose of Article V (1) of the New York Convention is to make the application of foreign awards enforceable in as many cases as possible[37]. Therefore, article V may be considered as facilitating the recognition and enforcement of foreign awards.

Several grounds have been set out by the New York Convention and national laws which can be up to the national courts or award debtors to refuse recognition and enforcement of the arbitral award.[38] However, there a distinction between the grounds for challenge and the

[32] The New York Convention 1958, Art III (1)
[33] The New York Convention 1958, Art VII (1), V (1) (e)
[34] Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press, 2001), 342, see also the New York Convention 1958, art V (1) (e)
[35] Born, G, (n28) 224
[36] Charles Chatterjee and Anna Lefcovitch, 'In Recognition and Enforcement of Arbitral Award.' International In-house Counsel Journal Summer 2016, ICJ, Vol.9, No.36
[37] Ibid
[38] Sundra Rjoo*, Law, Practice and Procedure of Arbitration*, (2nd edn, Lexis Nexis, 2017) 439

grounds for refusal. The challenge of an arbitral award is before the court in the country of arbitration seat, while refusal is before the court where recognition and enforcement of the award are applied for, which is the country where the award debtor may own assets[39]. The New York Convention, however, has not provided provisions for challenging the award before the court of the seat of arbitration.[40] This is because it is formed to promote the recognition and enforcement of foreign arbitral awards in the territories of other states.

The primary purpose of the New York Convention is to promote the enforcement of foreign arbitral awards.[41] An award creditor who seeks enforcement cannot make an argument that is not embodied in the provisions of the New York Convention.[42] Therefore, no consideration of the merits of the award is granted, and national law will not be the grounds of any such argument on enforcement. The list of stipulated grounds on which an award creditor may obtain enforcement is limited. According to Article V of the Convention, the grounds for refusing to enforce an award are limited to deficiencies affecting the arbitration proceedings or award, and this will involve violations, such as a flaw in the arbitration agreement, where there is incompetence in compiling the relevant legal principles or a breach of the public policy of the enforcement country.

6.4.1 Reciprocity

The New York Convention states that:

> "*When signing, notifying or acceding to this convention, or notifying extension under article x here, any state may on the bases of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state.*" [43]

Thus, it is up to the contracting state to choose whether to adopt the reciprocity clause, and that would mean that instead of enforcing any foreign awards wherever they may be rendered, states are only obliged to enforce awards that made in a state which is a party to the New York Convention[44]. Therefore, it is recommended when choosing the place for transnational commercial arbitration, to select a state that has adopted the New York

[39] Charles Chatterjee and Anna Lefcovitch, (n36)
[40] Ibid
[41] Redfern and Hunter (n21) 634
[42] Al-Bashir A. Awooda (n12) 216
[43] The New York Convention 1958, Art I (3)
[44] A.J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation,* (Kluwer Law International, 1994) 214-216

Convention to increase the chances of securing recognition and enforcement of the award in the other contracting state[45].

To the extent that states take advantage of it, the reciprocity clause has the effect of narrowing the scope of application of the New York Convention. Instead of applying to all foreign awards, wherever they are rendered, the range of the New York Convention may be limited to 'Convention awards'- that is, awards rendered in a state which is a party to the New York Convention.[46]

States that have accepted the New York Convention based on reciprocity have agreed, in effect, that they will recognise and enforce only Convention awards.[47] It must be mentioned here that the date on which the state is required to be checked, whether it is a member of the Convention or not, is the date when proceedings for recognition and enforcement started.

If a state is a member of the New York Convention by that date, an arbitration award rendered in that the state will be a New York award, even though, that state was not a contracting state when the award was made[48]. It indicates that the country is a party to the Convention if it is declared by the order in council that a country is a member to the Convention, this is to be the conclusive evidence of that expression.

Nevertheless, the limiting effect of the first reservation should not be exaggerated as the number of states that make up the international network for the recognition and enforcement of arbitral awards established by the New York Convention grows year by year.[49]

6.4.2 Commercial Relationships

Article 1(3) of the New York Convention grants the contracting states' members two reservations. The first is to restrict the Convention's extent by stating that it will implement the Convention "*to the recognition and enforcement of awards made only in the territory of another Contracting State*.",[50] therefore, this reservation limits the application of the New York Convention to the arbitral awards that were rendered in other states which are members

[45] Ibid

[46] Karen Tweeddale & Andrew Tweeddale, *A Practical Approach to Arbitration Law*, (Blackstone Press Limited, 1999) 281

[47] Redfern and Hunter, (n21) 618-619

[48] Karen Tweeddale & Andrew Tweeddale, (n48) 289

[49] Ibid

[50] New York Convention 1958, art 1 (3); see also A.J. van den Berg, (n44) 216

of that Convention. However, this reservation does not create a significant barrier because the majority of countries around the world have joined the Convention and implement it.

Secondly, article 1(3) New York Convention also provides a further reservation, which permits a state party to declare that it will only apply the Convention to legal disputes, whether contractual or not. Article 1(3) states that they do not apply to disputes which:

> *"...are considered as commercial under the national law of the state making such declaration..."*[51]

The effect of this reservation is to permit the signatory states to limit the scope of the application of the New York Convention. In fact, it allows every contracting state to present its grounds on the relationships is to be considered as commercial.[52] Thus, various interpretations can apply to what is to be commercial. Each national state may decide for itself what relationships it considers to be "commercial'' for the purposes of commercial disputes.[53] This situation creates barriers to the way of creating a uniform interpretation of the Convention. However, a minor number of countries have used this reservation in connection with states that have to apply a reciprocal reservation.

6.4.3 The rationale of the New York Convention

It is widely accepted that provisions for flexible rules to allow any required amendments to any convention enables it to provide for new developments in law, technology, and communication.[54] This relevant provision of the Convention requires each amendment to be ratified by each member state separately, which is a complex system. Furthermore, only the state which approves the changes will be obliged to accept these amendments.[55] Thus, the situation will be that every state has effectively ratified a different convention. It is an undesirable situation, and indeed, it has been found because new developments acquired and affected the Convention's key provisions[56]. For instance, the articles regulating the writing requirement, and another practical problem is that the courts of the member states have provided for a wide range of interpretations from the same provision of the Convention.

[51] New York Convention 1958 Article 1(3). A similar reservation is allowed by the Geneva Protocol 1923

[52] Charles Chatterjee and Anna Lefcovitch (n25)

[53] Redfern and Hunter (n32) 620

[54] Lew J. Mistelis, L. and S Kroll, (n3) 409

[55] Yasuhei Taniguchi (n1) 302

[56] Ibid

Despite all these issues, the New York Convention still contains some significant advantages. Firstly, it is drafted in an obvious way. Secondly, it proves a sound, valid and straightforward method for seeking recognition and enforcement[57]. Thirdly, it limits judicial interventions.

Furthermore, the Convention sets a basic legal structure, but it authorises national courts to enforce arbitral awards under more powerful models than those involved in its provisions. Incidentally, Article VII grants flexibility[58] to states which want to go further without agreeing on the basic arbitration framework outlined in the Convention.

6.5 Recognition and Enforcement under ICSID 1965

One of the principal reasons for concluding the ICSID Convention was to provide an opportunity to the newly born de-colonised countries to refer their disputes, which usually arose between the government of the newly born countries and private foreign investors[59]. The International Centre for Settlement of Investment Disputes ICSID Convention is another important convention governing the vital subject of foreign investment disputes through a specialist centre established for this purpose. One hundred forty three countries are parties to this Convention.

In a study of enforcement of foreign awards, the ICSID Convention deserves a rather detailed examination. This is because not only have so many countries joined the Convention, but it also covers the essential aspects of economic relations in the world which are the crucial areas of investment disputes, such as expropriation, termination or violation of agreements, as well as the application of tax and customs provisions.[60] As a result, an increasing number of cases are being referred to ICSID arbitration.[61] The ICSID Convention provides for its own enforcement system, which is distinct from the New York Convention and other international and regional regimes. The International Centre promotes arbitration under the Convention for Settlement of Investment Disputes (ICSID), which is operated by arbitral tribunals. In the event of any deficiency in an agreement between the parties, the tribunal will be formed of three arbitrators; each party names one arbitrator and the third is appointed by consensus of

[57] Ahmed Abu Al Wafa, *Optional and Compulsory Arbitration – on the Nullity of Arbitration Agreement Signed by Minor*, (3rd edn, Cairo, Daar El-Fakir, 2009) 403

[58] The New York Convention 1958, Art VII

[59] Charles Chatterjee and Anna Lefcovitch (n25)

[60] W. Reisman, *Systems of Control in International Adjudication and Arbitration*. (Duke University Press, 1992) 46

[61] Indira Carr, *International Trade Law*, (3rd edn. Routledge, 2005) 622

the parties.[62] The majority of the arbitrators must not be citizens of the two contracting states concerned in the dispute unless there is only one arbitrator, or with the consent of both parties.[63] In this way, the possibility of a court bias in favour of a fellow national is decreased.

The ICSID Convention incorporates rules indicating the importance of settling disputes. For example, if parties accept to subject their dispute to arbitration, they are not permitted to revoke their agreement to arbitrate it or to submit their subject matter to other judicial bodies. This applies to both national and international arbitration.

The ICSID Convention established the International Centre for Settlement of Investment Disputes. Article 25(1) of the ICSID Convention states that:

> "*The jurisdiction of the Centre must extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally*".[64]

The assumption of jurisdiction by an ICSID tribunal under article 25(1) contains the following: it must be a legal dispute, the parties must have agreed in writing to submit their dispute to ICSID,[65] the dispute must be between a Contracting State or of its entity and a private foreign investor from another Contracting State, no party may unilaterally withdraw from the dispute, and it must arise directly out of an investment.

Sudan has been a party to the ICSID Convention since 1973, and Sudan is therefore under a duty to enforce ICSID awards as has been illustrated. Sudan has not stated any categories of dispute that are not to be considered by the ICSID tribunal. However, it may be said that a broad definition of 'investment' proves to be helpful for the tribunal to assume jurisdiction. Criminal matters may not be referred to an ICSID tribunal[66].

In several cases, the provisions of Article 25 (1) have been relied upon by the Member States to challenge the jurisdiction of tribunals formed under the ICSID Arbitration Rules. In

[62] The ICSID Convention 1965, Art 37
[63] The ICSID Convention 1965, Art 39
[64] Article 25 ICSID Convention of 1965, Art 25. See also *Noble Energy Inc. and Machala Power Cía. Ltd. v Republic of Ecuador and Consejo Nacional de Electricidad* (2008) ICSID Case No. ARB/05/12
[65] R. Doak Bishop, James Crawford and W. Michael Reisman, *Foreign Investment Disputes: Cases, Materials and Commentary*, (2nd edn, Kluwer Law International, 2014) 344
[66] W. Reisman, (n60) 413

Ceskoslovenska Obchodni Banka, AS (Czech Republic) v The Slovak Republic, [67] the case was submitted by the Czech Republic on the subject of consent to arbitration under the ICSID Convention contained in the bilateral investment treaty of 1992 between the Czech Republic and the Slovak Republic. The Tribunal unanimously decided that the dispute was within the jurisdiction of the ICSID and the competence of the Tribunal. This decision expressed the view that the jurisdictional authority of a tribunal is based on the scope of the application of the ICSID Convention and the related bilateral treaties as required by Article 25(1).[68] However, the ICSID Convention goes further than the New York Convention in that it facilitates the enforcement of awards.[69] In fact, no other international arbitration system provides for such a privileged treatment of its awards as does the ICSID.[70] No Contracting State is allowed to make recognition and enforcement of ICSID awards subject to conditions not provided for by the Convention. For instance, such awards must not be subject to review when their enforcement is sought. It is an essential feature of this Convention that it provides for a comprehensive and mainly self contained institutional system of dispute settlement, which includes both the arbitral procedure and recognition and enforcement of its awards.

The term "investment" is not defined in the ICSID Convention. The Tribunal has severally addressed the notion of "investment" within the meaning of ICSID, article 25(1) and no consistent approach has emerged so far from the cases decided upon by ICSID tribunal.[71] To determine whether what is at issue is an investment a range of factors may be taken into consideration, namely: the duration of the agreement, the regularity of profits, and the surrounding circumstances of the agreement.[72] Any transfer of resources including money, goods or services, can be considered as an investment.

These Tribunals have pointed out four criteria that are essential to satisfy the investment requirement of the ICSID Convention. These criteria consist of a contribution, a specific duration, an element of risk, and a contribution to the host State's economic development.[72]

---

[67] *Ceskoslovenska Obchodni Banka, A.S. v The Slovak Republic*, 2004 ICSID Case No. ARB/97/4

[68] Indira Carr, (n42) 192

[69] Christoph H. Schreuer, *The ICSID Convention: A Commentary*. (Cambridge University Press, 2001) 122

[70] Ibid

[71] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco,* ICSID Case No. ARB/00/4 Decision on Jurisdiction (2002)

[72] Christoph H. Schreuer

[72] ICSID Case No. ARB/00/4 (n71)

The evidence to be supplied under the ICSID Convention is very simple. Article 54(2) stated that:

> *"A party seeking recognition or enforcement in a Contracting State shall furnish the competent court with a copy of the award certified by the Secretary-General."*[73]

Thus, the only evidence that is required to be supplied by the enforcing party is a copy of the award certified by the Secretary-General. The ICSID awards must be enforced by its member states concerned as if they were final judgments decided by their national courts. Thus, ICSID awards are enforceable within its member states directly.[74] For example, if A is a contracting a state to the ICSID Convention and B who is also a national from C which is a contracting state and A is an ICSID award creditor, then A will directly start the proceedings to recognise and enforce that award. In brief, all the states which are parties to the ICSID Convention are obliged to recognise and enforce the ICSID awards as if they were final judgments of their domestic courts.

It is worth noting that an appeal against ICSID awards is not permitted. This ground, however, does not include appeals on the grounds of wrong interpretation or application of the law.[75] Under article 53 of the Convention, the award will be binding on the parties, and will not be subject to any appeal. The centre may permit corrections of grammatical errors.

Article 54, which relates to the recognition and enforcement of awards, is one of the essential articles in the Convention. The drafters of the Convention did not mean to permit a review of law and fact. Some authors criticised arguments of ICSID ad hoc Committees in two cases, *Klöckner Industrie Anlagen GmbH v. Societe Cameroon des Engres* and *Amco Asia v. Indonesia*,[76] where they seem to be going as far as establishing a form of appeal within the ICSID arbitration framework. These cases, though not entirely in agreement with each other, were designed to shape the ICSID annulment procedure.[77] In these cases, referring to article 52(1) (e), the Committees held that the reasons for the awards addressed were not "sufficiently relevant" or "reasonably adequate".

[73] Article 54, The ICSID Convention 1965, Art 54

[74] The ICSID Convention 1965, Art 25(1), (2)

[75] Ibrahim F. I. Shihata, "*The Contribution of ICSID to the Settlement of Investment Disputes with a Particular Reference to Arab Countries*", (2nd edn. Daar AL Nahada AL Massrya, August 1997) 402

[76] ICSID Case ARB 81/1 and ICSID Case ARB 81/2

[77] Charles Chatterjee and Ana Lefcovitch (n67)

In *re Arbitration of Certain Controversies in the case of Chromallog Aeroservices v the Arab Republic of Egypt*,[78] the Arab Republic of Egypt and Chromalloy entered into a contract, whereby Chromalloy agreed to supply parts and provide maintenance service for helicopters in the Egyptian Air Force. The parties agreed that in the event of a dispute arising under the contract, they would submit it to arbitration, which the law of Egypt would govern. Incidentally, they also agreed to waive all rights of appeal. The relevant parts of the arbitration clause provided that:

> *"... Both parties have irrevocably agreed to apply Egyptian laws and to choose Cairo as the seat of the court of arbitration. [Furthermore] ... the decision of the said court shall be final and binding and cannot be made subject to any appeal or other recourse."* [79]

A dispute arose under the contract, and Chromalloy commenced arbitration proceedings in which the tribunal rendered an award in favour of Chromalloy, which in turn, sought to enforce the award in a US District Court.[80] The Government of Egypt and indeed the court promptly issued a nullity order. It is not essential to identify the basis for the order of nullity in this context but to point out how the New York Convention provisions on recognition and enforcement of foreign arbitral awards fail[81]. This proves that the ICSID regimes and New York Convention regimes in regard to recognition and enforcement of arbitral awards are different.

The ICSID Convention prohibits any review since the national courts,[82] or the competent judicial authority does not have the power to review and audit the arbitral award during the recognition and enforcement proceedings. So whether the arbitral tribunal has jurisdiction or not, or any review of the provisions issued by ICSID regarding the validity of the procedures, or even the examination of whether the award conforms to the public policy of the State of enforcement should not take place.[83] However, the ICSID Convention stipulated that the task of the national courts or the competent authorities be limited to verifying the validity and

[78] In re Arbitration of Certain Controversies in the case of *Chromallog Aeroservices v. the Arab Republic of Egypt* (939F Soil) G07(DDC.1996)

[79] Ibid

[80] Richard J Coll, 'Comment; United States Enforcement Of Arbitral Awards Against Sovereign States; Implication of ICSID Convention' (1976), Harvard. International Law Journal. 404-405

[81] Ibid

[82] Ibid 404- 409

[83] Ibid

reliability of the signature of the Secretary-General of the ICSID Centre on foreign arbitral awards.

When requesting enforcement, the New York Convention was limited to a request for the need to obtain the appropriate executive form in the state concerned.[84] The ICSID Convention went further; where a party has been alleged award in an ICSID arbitration there exists that obligation to abide by the arbitral award, and cannot be challenged or excluded for any reason, except those cases stipulated in the agreement for non-implementation, which have been incorporated into Article 53.[85] Article 54 of ICSID Convention requires the parties to the Convention to recognise the arbitral award rendered by the Convention as a binding provision and to enforce the financial obligations established under this award as if it were a final judgment issued by a court of the requested State.[86]

It is clear from a review of the arbitration disputes that were referred to the ICSID Centre that the vast majority of these disputes were recommended for an amicable settlement or the suspension of lawsuits,[87] or the parties voluntarily chose to enforce it. Therefore, member states are quick to settle the dispute at the ICSID Centre amicably, to avoid being subjected to legal sanctions as stipulated in the Convention.[88]

This confirms the success of ICSID which operates tribunals as arbitration centres and demonstrates the benefit in achieving its endeavours and ensuring the international protection of the awards issued within its scope and framework, to protect the rights and interests of foreign investors. However, to enhance international confidence in the ICSID as an essential arbitration mechanism provider, [89] it is also necessary to apply the principle of the authoritative nature of the arrangement in such a way as to give maximum effect to any previous arbitral award issued between the same parties where the dispute arose again.[90]

---

[84] Richard J Coll, (n60) 323

[85] Sundra Rajoo (n27) 498

[86] Luther C. West, 'Award Enforcement Provision of the World Bank Convention' (1968) 23 Arbitration Jouirnal 38 P.38

[87] For example, amicable resolution and discontinuance issued on 5 February 2007 at the request of the parties in the case of *Rail World LLC and others v Republic of Estonia* ICSID Case No. ARB/06/6

[88] Article 54 of the Convention offers certain procedural directions: '*Parties to the Convention shall designate the competent authorities for recognition and enforcement to the Centre; a party to arbitration proceedings may submit a certified copy of an award to such an authority; and the modalities of execution are governed by the law concerning the execution of judgments of the country where execution is sought.'*

[89] Georges R.Delaume, *ICSID Arbitration and the Courts.* (Cambridge University Press, 1983) 607

[90] Luther C. West, (n65) 47

6.6 Recognition and Enforcement of Foreign Arbitral Awards under the Riyadh Arab Convention on Judicial Cooperation 1983

A significant regional treaty for enforcement of arbitral awards is the Riyadh Convention on the Judicial Cooperation between the States of the Arab League of 1983. This Convention was signed in Riyadh, by several member states of the Arab countries. It repealed the three Arab League Conventions of 1952. It came into force in 1985 and combined the essence of the New York Convention with the principles of Islamic law. The Riyadh Convention adopted many basic tenets of the New York Convention[91] and western bilateral agreements, for example, the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters 1968.

The Riyadh Arab Convention covers many issues concerning judicial cooperation between the states of the Arab League. For example, it states that the citizens of a member state will accede to the courts of any Arab Member States.[92] Another example is the appearance of witnesses and experts in criminal cases.[93] A significant feature of the Riyadh Convention may be found in article 37 which is the rule that limits the court at the place of enforcement from subjecting the dispute to a reappraisal.[94]

Article 25(b) of the Convention provides that:

> '' *...without prejudice to Article 30 of the Convention, the contracting parties shall recognize decisions made by the courts of any other contracting party in civil matters, including judgments relating to civil rights which are made by criminal courts, as well as decisions made in commercial, administrative and personal status matters which have become res judicata ...*''[95].

It should be highlighted that this provision ensures that the Convention enforces arbitral awards which were issued in a state party to the Convention regardless of the nationality of the award creditor. An award rendered in Jordan in favour of an Irish person, for example, will, therefore, be enforceable in Sudan as a Court of a signatory state made the award.

---

[91] The Riyadh Arab Convention on Judicial Cooperation1 1983, Art 37

[92] The Riyadh Arab Convention on Judicial Cooperation 1983, Art 2

[93] The Riyadh Arab Convention on Judicial Cooperation1 1983, Arts 22-24

[94] Ahmed M.Abdel Badi Sheta, *The Arbitration an Explanatory and Comparative Study of Judicial Provision & Arab and International Arbitration Institute* (3rd edn, Daar AL Nahda Al-Arabiya, 2009) 395, see also the Riyadh Arab Convention on Judicial Cooperation1 1983, Art 37

[95] The Riyadh Arab Convention on Judicial Cooperation1 1983, Art 25(b)

One may infer from the provisions of the above article that each state which is a party to the Convention is under an obligation to recognise arbitral awards made in civil and commercial matters in another member state. The Riyadh Convention provides a clear description of the jurisdiction of the courts of the place where the arbitral award is rendered and the courts of the place where recognition is sought[96]. Thus, a party who seeks recognition will be able to do so according to a predictable process.

Article 30 of the Convention provides for the enforcement of judicial decisions, as well as arbitral awards issued in the Contracting States, without the need for a retrial, as stipulated in article 37 of the Convention. One of the features of the Riyadh Convention is that the procedures for enforcing foreign arbitral awards were simplified in accordance with conditions embodied in article 37.

For example, foreign arbitral awards delivered in a contracting state must be enforced provided they meet the following conditions: the dispute is arbitrable; the arbitration agreement is valid and has become final; the subject matter of the dispute falls within the scope of a reference to arbitration under the arbitration agreement; the parties have been adequately served with subpoenas and the award rendered does not imply a contradiction with the provisions of Islamic Shari'a, the public order or the rules of conduct of the requested party.[97] The condition that an award must not contravene Islamic Shari'a and the moral principles of the Muslim member states distinguishes the Convention from its equivalent multilateral treaties in other parts of the world. However, there is one notable exception, and this is the definition of public order and the significance assigned to the principles of Islamic law.

In many Arab countries, the principles derived from Sharia law are considered to be the part of the public order, and consequently, a judgement, which stands in breach of it, will not be recognised.[98] Moreover, the constitutions of many Arab countries refer to the Islamic Sharia, or its provisions or principles, as `the' or 'a' source of legislation or provide (at times also) that Islam is the religion of the state.[99] This also can help in the interpretation of the term 'public

[96] Ahmed M.Abdel Badi Sheta (n94) 401

[97] Samir Saleh. T*he Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East*. (Leiden: Rill, 1985) 21-25

[98] M.S. Berger, L *Sharia and Public Policy in Egyptian Family Law.* (University of Amsterdam Press, 2005) 576

[99] Clark Lombardi, *State Law as Islamic Law in Modern Egypt, Journal of Islamic and Middle Eastern Law*. (Brill, 2006), vol. 2(11), 63-72: http://zora.uah.ch/96938.); accessed 12 June 2018

order' and has been used by the courts to argue that specific provisions are mandatory[100]. Art. 30 (a) of the Convention, however, goes beyond this by elevating the principles of Islamic Sharia on a stand alone basis; not part of but instead supplementing the concept of public order.

This raises the question of whether under the Convention, the application of Sharia principles is more extensive than under the respective national laws. This may be of importance in particular, according to the prevailing opinion in Islamic law, interest on loans is not permissible.[101] However, most Arab jurisdictions today would accept interest claims but often capped at a certain amount.[102] Does the Riyadh Convention entail that interest claims in cross-border business cannot be enforced because they contravene the principles of the Islamic Sharia? Is the Convention stricter than national laws, as it requires adherence to Sharia rules even where the respective country does not follow them rigidly? Also, the permissibility of speculative contracts, such as insurance, options, and swaps, are discussed controversially among Islamic jurists.[103] Does the Convention of Riyadh exclude the enforcement of claims based on an insurance contract because this may be seen as contradicting Sharia law?

It should be noted that the concept of public order under the Convention, as well as the role of Sharia law in defining it, warrant further research and clarifications. On the other hand, although the Riyadh Convention provides that member states be obliged to recognise judgments made under the Convention (under article 25 (c)), it does not include judgments on bankruptcy, tax cases, and civil matters.[104] The Convention is unclear as it does not define what is 'commercial'. This state of affairs becomes problematic when a court may issue a judgment in what it considers to be a commercial issue; while the contracting state where the award is to be enforced does not consider the matter to be as such.

The implementation of the rules of the Convention does not require that the legal system of the contracting State be obliged to recognise or enforce the award[105]. It should be noted that

[100] Ibid

[101] Nabil A. Saleh. *Unlawful Gain and Legitimate Profit in Islamic law,* (2nd edn. Kluwer Law International, 1992) 209

[102] K. Bairid D. Zatael,: 'Interest Rate Caps in International Financing Transactions', (2013) Bagdad Newsletter CI the RA 11.ikng Lon Conatiittec, 28

[103] Nabil A. Saleh (n75)222

[104] K. Bairid D. Zatael (n102)

[105] Ahmed M.Abdel Badi Sheta (n96) 422

the articles of the Convention do not apply to judgments made against the Government of the State. In addition, the rules do not apply to provisions that are not recognised or implemented with international treaties and agreements in force with the requested State, as well as temporary and restraining proceedings and judgments in bankruptcy and taxation.

It should be noted that the enforcement of arbitral awards is not uniform in this region, and domestic arbitral awards are in general much more straightforward to enforce than a foreign arbitral award.[106] The possibility of enforcing a foreign arbitral award is more significant in countries that have acceded to the New York Convention [107] than Islamic states that tend to view the Western legal framework with a degree of mistrust.[108] Such a structure has traditionally accorded much importance to Islamic law, and the origins of its distrust can be traced to the arbitrations related to oil concessions in the Middle Eastern countries; for example, between Kuwait and the international oil companies (AMINOIL arbitration, for example).

The provision of article 30 of the Riyadh Arab Convention sets out a list of grounds for refusing recognition and enforcement of an arbitral award. It is examined below. It should be pointed out that it is drafted in an amendatory way ''the recognition and enforcement shall be refused in the following cases...''.[109] It is suggested that this amendatory way is unacceptable because it gives the competent court the discretion to refuse recognition and enforce it by itself.

The first of these sets out four possibilities: firstly if there is a violation of Sharia Law. Section 30 (A) of the Riyadh Arab Convention provides that, ''If recognition would be in Contradiction with the stipulations of the Islamic Sharia, the provisions of the constitution, public order, or the rules of conduct of the requested party".[110] However, it should be mentioned here that the grounds of sharia law were not drafted by the old Arab league Convention or the Riyadh Convention. It is suggested that these grounds are extensive and need to be excluded from applying to the proceedings in any member state or at least must be amended because under this ground the competent court can refuse to grant recognition.

---

[106] Azemi Atiya, *Kuwaiti Arbitration Law, Study of Internal Arbitration Law Rules under Kuwaiti Procedures Law,* (Daar AL Nahada AL Rabya, 2012) 417-521

[107] Marshall J Breger and Shelby R Quast, 'International Commercial Arbitration', Journal of International Law, (2000) Vol. 32, and Iss. 2

[108] Sami Fawzi, *International Commercial Arbitration, Comparative*. (Daar Al- Nahada Al-Masrya, 2009) 392

[109] See the Riyadh Arab Convention 1983, Art 30 (A)

[110] Samir Saleh, (n68) 118

The second ground relates either party's capacity. Section (c) provides that: " If the law of the requested party relevant to legal representation of ineligible persons or persons of diminished eligibility was not taken into consideration."[111] Every party, including a foreigner who is competent to contract, can enter into the arbitration agreement. The party must be of the age by the law to which he is subject, and must be of sound mind and not disqualified from control acting by any law.

The third ground section (c) provides another ground for refusing recognition and enforcement of judgments ''If the judgment was passed in absentia without notifying the respondent of the proceedings in an appropriate manner that would enable him to defend himself." [112] As has been previously discussed, the courts of the place where enforcement is sought need to make sure that the award meets certain levels of due process. Such levels may relate to the giving of a proper notice of the fact that cause arbitration is instituted. The Convention is almost equally strict. According to an above article, the recognition of the judgment should be refused in the following cases.[113] Article 30(d) provided that the foreign award may not be enforced if by way of defiance the losing party can prove that the matter in dispute in the international tribune also had already been the subject of a final and conclusive judgment of some other court having jurisdiction in the matter.

The provision of the article (30) provides a precise definition of the meaning of the res-judicata conflicting judgments. A foreign award which conflicts with a previous domestic judgment cannot be enforced. Finally, there is also the public order issue which has been previously discussed

6.7 Recognition and Enforcement of the Award Amman Arab Convention 1987

This Convention allowed the enforcement of an arbitral award through the high court in any signatory state.[114] Therefore, a person who seeks to enforce the centre's awards must apply for it to the high court concerned. The High Court can only refuse to grant permission for recognition and enforcement if the award is contrary to the public order of that jurisdiction.

[111] Riyadh Arab Convention on Judicial Cooperation 1983, Art 30(c): see also Azemi Atiya (n81) 119-121

[112] Riyadh Arab Convention on Judicial Cooperation 1983, Art 30(b)

[113] Samir Saleh. (n84) 118-121

[114] Amman Convention 1987, Art 2, which limits the Convention to signatory states

The Amman Convention was drafted along with the ICSID Convention, which stipulates that the award shall be final and binding and not subject to appeal and that, all parties shall accept the award.[115] Although the Amman Convention is like the ICSID Convention in many respects, it is not very popular as it limits all applications[116] and reports are submitted in the Arabic language and the Arab states. As a result, most of the parties to international trade agreements face difficulties in the proceedings under the Amman Convention.

However, the provisions of the Convention did not require consent to the enforcement of the award if it was contrary to the public policy of the State.[117] The Amman Convention provided for the same general provisions on the recognition and enforcement of foreign arbitral awards through the high court in the jurisdiction concerned. When it comes to the application of the Amman Convention in Sudan, one can envisage difficulties of enforcement, especially where there are different issues relating to the moral or public obligations that are apparent in Sudan and Islamic principles, which mainly govern the proceedings in the Sudanese courts.

Secondly, most of the countries in the Arab world that have joined the New York Convention; and thirdly, the Arab States have enacted international arbitration legislation that differentiates between national and international arbitration.[118] Moreover, there is the UNCITRAL Model Law, which represents the global consensus on who should develop the basic rules and fundamental issues in international commercial arbitration.[119] The objective of the Model Law is to facilitate regular practice and the development of harmonious economic relations. In particular, it aims to strengthen the legal mechanisms to ensure a fair and effective solution to commercial disputes.[120] The Arab States may be categorised into three categories on the issue of recognition and enforcement of arbitral awards[121]. First, the Arab countries that do not subscribe to the New York Convention and do not differentiate between international and regional conventions. Second, the countries that do not accept the

[115] The ICSID 1966, Arts 53-55. Convention on Enforcement of Awards

[116] The Amman Convention, Art 37 provides that the Convention be subject to approval, acceptance, and ratification of the signatory states.

[117] The Amman Convention 1987, Art 35

[118] Mohammad Al Mimari, *Commercial Arbitration & National Courts Intervention*. (Daar Al-Nahada A-lmasrya, 2014)

[119] Sundra Rajoo (n84) 512

[120] Marshall J Breger and Shelby R Quast, 'International Commercial Arbitration:' (2000) Journal of International Law, Vol. 32, and Iss. 2 No.35

[121] Abdul Hamid El-Ahdab (n15) 312

provisions of the Model Law as a whole,[122] and third, those countries that adopt a framework based on the Model Law because this provides better access and transparency to non-local entities. The Model Law is arguably the most appropriate and widely adapted to the requirements of transnational commercial arbitration.[123]

The Amman Convention is much more progressive compared to the other regional conventions because it comprises all fourteen Arab states in the region.[124] However, the other conventions are limited to six-member states only. The main obstacles to enforcement are relating to interpreting the Convention in the Member States because of the different colonial regimes with different legal structures and languages[125]. For example, Sudan and Egypt were colonised by Great Britain, whereas Morocco and Algeria were by the French. The impact of the Amman Convention on the global market is still insignificant.

The second sentence of article 35 of the Convention states:

" *Leave may only be refused if this award is contrary to public order*." [126]

It explicitly ensures that the only valid ground for refusing to grant permission to recognise and enforce the Arab Centre for Commercial Arbitration awards is if the award is contrary to public policy. Therefore, the discretion of the High Court is to examine whether the award is contrary to the Sudanese notion to the public order or not. If the answer is in the affirmative, then it can refuse recognition and enforcement.[127] It should be mentioned in this regard that the Sudanese concept of public order is tightly interwoven with the principles of Sharia law.

6.8 Conclusions

This chapter has examined the approaches of the Sudanese Constitution regarding policies to International Conventions and Treaties. However, although the Sudanese Constitution has encouraged the government to open up to the international community and join regional and international conventions and treaties that help in developing laws and increasing the growth of the economy in Sudan, the political circumstances that Sudan experienced during the past

[122] Ibid
[123] Mohammad Al Mimari (118) n324
[124] Marshall J Breger and Shelby R Quast (n12)
[125] Sundra Rajoo (n119) 523
[126] The Amman Arab Convention 1987, Art 35
[127] Saad Badah, 'Grounds for Refusing Recognition and Enforcement of a Foreign Arbitral Award Which Was Set Aside Abroad' The North Carolina Journal of International Law (2015) 79

thirty years have made the country ineffective and absent from many treaties and international conventions. Therefore, Sudan must open her doors to the international community, particularly the Western world. Sudan is also needed to review all regional agreements and treaties that do not serve her economic and commercial interests.

As has been discussed, the New York Convention has undoubtedly facilitated the enforcement of foreign arbitral awards in states other than the states where they were rendered. This success can be viewed in its provisions supporting such enforcement, for example, article III and article VII (1). Article III is regarded to be the heart of the Convention since it requires the Contracting States to recognise and enforce the award as binding, whereas article VII (1) is described as the "most advantageous right" provision, for it provides that the Convention provisions shall not deny any affected party of any right[128]. Therefore, these articles are considered to be the essential features of the New York Convention.

The grounds for refusing recognition and enforcement vary because it is mainly based on the grounds that have been adopted from a convention of a flexible nature such as the New York Convention[129]. Under the New York Convention, a failure by a party to provide evidence does not lead the application being refused as the enforcing party can perform or present evidence as proceedings progress. This chapter explored how national laws provided conditions for the recognition and enforcement of foreign arbitral awards which may not be found under the conventions. National courts are never eligible for granting enforcement of a foreign arbitral award unless the conditions are established, namely that the parties were correctly notified.

However, despite giving arbitral awards the flexibility to be recognised and enforced without many limitations, the Convention established specific grounds, in article V of New York Convention, to refuse to enforce the awards. The various questionable grounds, which have given rise to significant debate is IV, (1) (e), especially the second part regarding arbitral awards revoked in their country of origin. Besides, the execution of this ground has mainly led to the limitations of the New York Convention, as has been shown[130]. The first deficiencies are reflected in the ambiguous wording of the word "may" in Article V (1). On the one hand, this ambiguity has pointed to the enforcement courts having the unlimited

[128] A.J. van den Berg (n15) 401
[129] Ibid
[130] Luther C. West (n86) 177

power to interpret the word "may" and, thus, influencing the execution of the refusal under sub-article (1) (e). Moreover, interpretations of the word "may" differ between scholars and the enforcement courts. On the other hand, there is also and the ambiguous wording that has given rise to a legal dispute[131].

This chapter further explained that the Riyadh Convention's range of application on the enforcement of foreign arbitral awards is minimal since only six member states are signatories to it. The Riyadh Convention extends the New York Convention with Islamic law principles while the Amman Convention provides a broad scope of enforcement in the fourteen states. However, the Amman Convention is restricted to awards made in signatory states. This determines that the range of application of the Amman Convention compared to the Model Law and the New York Convention is very close. The Amman Convention provides that an award must not contain a request caused by a contravention of the applicable laws, which might lead obliquely to the condition that parties have to choose Amman law as the applicable law governing disputes; otherwise, the enforcement will be refused.

The chapter has studied the issue of recognition and enforcement of foreign arbitral awards, the concept of an arbitral award, its definition, nuances, and the relevant conventions, and the purposes of the recognition and enforcement of the arbitral awards. Also examined were the grounds for refusal of enforcement of an arbitral award under the New York and the ICSID Convention.

[131] Ibid

Chapter 7 Final Conclusions

Throughout this research, five areas have been addressed. The first area is concerned with the legal and arbitration systems in Sudan. This research examined the historical growth, and development of the arbitration systems and judicial settlement in Sudan from 1504 until 2016.

The first arbitration law in Sudan, the 2005 Act was an attempt to reform the arbitration system in Sudan. It has been argued that the ideas of reform were occasioned by the need to bring Sudan's law up to date and the need to keep Khartoum as a leading arbitration centre in the Arab and African worlds. From this standpoint, the Sudanese arbitration law was critically examined, and it was identified that several areas would require modification. Either Islamic principles guide Sudan, the most significant sources upon which Sudan relies, or from those of the international conventions that Sudan has ratified.

Various sources of law govern the recognition and enforcement of foreign arbitral awards in Sudan. In principle, the Sudanese Constitution, Islamic law, various Sudanese domestic civil laws, and several regional and international conventions and treaties are all factors. However, it has been shown that the conditions for enforcement and the grounds for refusal are critical issues within the framework of the terms and grounds provided for in the New York Convention.

The answer to the question of whether the current legislation in Sudan is adequate for dealing with domestic arbitration has attracted attention in this research. An attempt has also been made to demonstrate the functioning of the arbitration system and legislation in Sudan prior to the Arbitration Act 2016 coming into force. However, even the 2016 Act contains certain lacuna, which has been identified in this research. The discussion in chapters 2 and 3 conclude that in the current legislation, many provisions are by nature general, outdated and do not improve arbitration proceedings. For example, the current legislation is not harmonious with the modern practices of commercial arbitration, whether domestic or transnational. However, most of these provisions have been borrowed, predominantly from the Egyptian Arbitration law of 1994, Saudi Arbitration System no. 46 /1404 and Jordanian Law Act 2001 and have not operated to promote arbitration in Sudan. The current legislation does not explicitly define 'arbitration', nor, does it distinguish between domestic and transnational commercial arbitration. Moreover, the existing legislation fails, for example, to

define arbitration agreements and the formation of the tribunal; nor do they define the conditions that have to be incorporated into an arbitration agreement.

Insofar as international arbitration under the current Act occurs; this research has concluded that the current arbitration legislation in Sudan is not entirely adequate for international commercial arbitration. Nevertheless, that Act has attempted to follow the fundamental base of transnational commercial arbitration. The amendment to current law must provide that foreign awards and agreements are equally enforceable in Sudan. Therefore, national courts have to stay as proceedings courts and refer the parties to arbitration whenever the existence of a 'transnational' arbitration agreement has been claimed by a party, provided that, the agreement has been validly entered into. This is regardless of whether the subsequent arbitration is to take place in Sudan or outside of that country, provided that, in the latter situation, the rules of arbitration were subject to the procedures of Sudanese law. However, the critical step that the legislature has to engage in, in this regard, is to clarify which disputes are considered transnational for referral purposes.

Moreover, specific alternative means should be put forward to be adopted by the legislator to modernise its arbitral legislation. These would require the New York Convention and the Model Law of 1985 on Transnational Commercial Arbitration to be implemented into Sudan's arbitration law. The Sudanese legislator should make sure that the enforcement provisions of domestic, international and foreign awards are carefully drafted. Also, under the enforcement provisions of Sudanese arbitration law, it must be stipulated that foreign awards are enforceable according to the New York Convention. It is not mandatory to provide in which conditions foreign awards will be refused enforcement. To this end, the best model for the Sudan legislator is to adopt the English Arbitration Act 1996 given the internal consistency of the enforcement provisions of its domestic, transnational and foreign awards.

Chapter 4 examined arbitrability and public policy under the Sudanese arbitration system. It also studied the grounds for refusal of recognition and enforcement on the ground of non-arbitrability and public policy under the current legislation. The common controversial issue is the 'arbitrability' and public policy due to the complexity and contentious understanding of the traditional interpretation by Sudanese courts regarding recognition and enforcement of foreign arbitral awards. However, the international commercial community and countries are encouraged to make more effort to establish and narrow their interpretation of 'public policy' in order to enhance transparency in their jurisdictions and in particular statutes that govern

the arbitration. Some experts have recommended that the international community should adopt similar model standards of public policy by setting transnational public policy, which is derived from common primary values and principles between the nations of the world, rather than leaving each state to create a decision on enforcing an award based on its restricted domestic public policy. The researcher believes this suggestion is reasonable and worthy of more study. Furthermore, it is possible to undertake this if there is a real shared enthusiasm in the international community to increase the level of integrity and clarity of the arbitration process.

The question of whether the current arbitration legislation is satisfactory for recognition and enforcement of foreign arbitral awards has been examined in Chapter 5 of the 2016 Act. It requires some reformation to bring the arbitration system in Sudan in line with advanced forms of arbitration legislation elsewhere. Sudan recognises and enforces foreign arbitral awards and refuses applications of recognition and enforcement of foreign arbitral awards that violate its public policy.

Several aspects of the current legislation may prove to be a significant obstacle to the recognition and enforcement of foreign arbitral awards in Sudan. Notable among these are the provisions setting the burden of proof regarding the grounds to refuse enforcement on the parties that apply for recognition and enforcement. Even though this is just one phase, the researcher submits that it negatively affects the Act regulating foreign arbitral awards in Sudan. Another obstacle is the requirement for enforcement, the legislation of multiple sources of provisions, which regulate the recognition, and enforcement of foreign arbitral awards in Sudan. It is a method of policy; the Sudanese Constitution provides for Islamic principles and sharia law, which may be not liked by many foreign investors in Sudan.

The supervision and control of arbitral tribunals by the judiciary seem to be essential. It has been shown that arbitration could not survive in isolation from the courts. The jurisdictional and contractual theories of arbitration sit conveniently with the belief that there must be government control over arbitration on public policy grounds because the guiding principle is that it has failed to take into consideration the necessity to free arbitration from the supervision of the courts. Moreover, arbitration cannot endure outside of a legal connection. A body of law can only give an agreement to arbitrate the rules governing the arbitral process.

The fact is that the enforcement of arbitration awards is connected to several rules in Sudan. The research suggests a review of the regulations and modifications to activate and implement an international arbitration convention at the domestic level. Notably, the review and amendment should define the mechanisms for regulating the different legal methods that govern the recognition and enforcement of foreign arbitral awards in Sudan.

First of all, The Sudanese Government urgently needs to take serious steps to resolve the issue of Sudan's accession to the New York Convention. The arguments adopted by the Ministry of Justice and judiciary on the issue of Sudan's accession to the Convention will seriously harm Sudan's commercial interests and relations with the international community, especially those Contracting States to the New York Convention. Mainly, Sudan is on the brink of a broad political, commercial and legal transition. However, Sudan is still required to explicitly acknowledge its instrument of accession to the Convention with the UN Secretary-General. Sudan is also required to take a clear stance towards implementing the Convention in Sudan and improving the arbitration system to accommodate the Convention's rules. Otherwise, under Article XIII (1) of the New York Convention, Sudan may denounce this Convention by written notification to the Secretary-General of the United Nations. However, if this is done, it only takes effect one year after the date of receipt of the notification by the Secretary-General.

Sudan implemented New York Convention 1958 and found a platform to settle international commercial disputes by enforcing foreign arbitral awards. This platform could not be agreed by all the states joining in the Convention because some of the Convention's terms remained controversial. Concerning article V of the Convention, nations such as Sudan expressed concern that they would not implement the provisions of the Convention without interfering with their national laws. Thus, Sudan is one of the member states that were considered because of the differences in their legislative rules. This was because Sharia Law governs Sudan, and from this vantage point, the country has different legislative systems, and yet the provisions of the New York Convention were designed to recognise and enforce foreign awards. The country has also subscribed to the Riyadh Arab Convention and the Amman Arab Convention.

However, the implementation of the New York Convention will end a long period of doubt regarding the seeking of the enforcement of foreign arbitral awards in Sudan. The country's joining the Convention will be without the two reservations of "reciprocity" and

"commerciality", which affects the extent of interest in transnational commercial arbitration in Sudan. That means that the Convention applies to any foreign award in Sudan, regardless of whether the seat of arbitration is a party to the Convention or not, and irrespective of whether the subject of a dispute which has arisen is commercial or not under the Arbitration Act 2016, article 48(a).

Sudan should adopt open approaches to international trade and investment that may be achieved through ensuring that international investors in Sudan were guaranteed the security of their investments through being granted access to the internationally accredited mechanism of dispute resolution. However, Sudan was thought to recognise and enforce foreign awards within her national jurisdiction.

Sudan should continue to streamline her laws as closely as it can in line with the New York Arbitration Convention, providing a process of integration with the commercial world. Such integrative actions will further assist the promotion of multilateral trade that Sudan can engage in and benefit from if Sudan pursues her existing policies, that would be identified by abusing the limitation of Article V (2) of the New York Convention, as well as improperly seeking to secure the interests of Sudanese nationals. The international community will be discouraged from joining in free trade with Sudan, mainly because of concerns relating to arbitrary and damaging behaviour by its courts, and this will eventually damage the Sudanese economy**.**

One of the critical factors behind the problem of practising arbitration in Sudan is the lack of published work, trained lawyers and judges in dealing with disputes on transnational commercial arbitration. Many of the Sudanese lawyers are not very experienced in enforcing foreign arbitral awards, providing evidence, witness statements, and they also lack appropriate legal language, particularly in preparing defence statements.

Suitable archives and databases are also needed. The researcher also recommends and calls for increased attention in investigating the grounds and methods for recognising and enforcing foreign arbitration awards in Sudan. Given the current lack of case law or issued awards and accompanying publications on enforcement of foreign or national arbitral awards in Sudan, this is vital. Sudanese courts need to be able to understand and follow the different rules related to international commercial arbitration, and, in particular, the enforcement of foreign awards. It is expected that this, in turn, will encourage a stronger application of international norms and standards concerning enforcement of foreign arbitral awards. There

is a need to provide a database of awards or issues in the English language so that foreign investors can practice the Sudanese settlement system to the same level that they can with the advanced arbitration system elsewhere in the world.

Sudan also needs a group of highly qualified arbitrators and should follow the fundamental principles of the law of contract, according to which the localisation of the performance of a contract provides the governing law of a dispute and give the jurisdiction at which dispute method be decided. The Sudanese draft provides an exception to the enforcement of the arbitral award, by granting the parties the right to agree on other procedures or methods to recognise and enforce the arbitral awards. It is stipulated in the Act that the court must avoid any agreement on the recognition and enforcement of an award and may not consider that public policy should control this exception. Also, it should provide specialised training in arbitration as a settlement system, and transnational commercial arbitration practice should be created for judges, lawyers and people in the business.

In other words, Sudan should not encourage the de-localisation of disputes whereby they would be decided in various foreign jurisdictions. The local substantive law and the procedural law for settling a dispute by arbitration should be Sudanese. Law firms and arbitration centres must play an essential role in creating the current concept of arbitration practice by holding conferences and training sessions for the lawyers. The lawyers, in turn, should write and publish articles and comments on arbitral awards and problems which the current arbitration system currently experiences.

This researcher believes that Sudan needs to reform her judicial system in connection with improving her totalitarian regime, to increase equality, and build social peace. This chapter developed from the hypothesis that the weak and corrupt judicial system will hinder all steps from establishing a modern, democratic, fair, and transparent judicial system. Also, the rule of law will not operate effectively with a weak judicial system. Therefore, the researcher believes that the reform and independence of the judiciary is an essential element of the reform process, which depends on security and political stability. The researcher understands that Sudan has not yet achieved the necessary stage of legal maturity in its post-conflict society.

Arbitration centres and institutions should improve their organisation and formulate internal rules so that they can achieve arbitral proceedings more professionally. They should hold data for domestic and transnational arbitration cases and record for qualified arbitrators.

The separation of the Sudanese judiciary from the executive branch of the government is also needed to provide confidence in the minds of foreign investors. This researcher has deliberately chosen that term of the 'transnational' rather than 'international', as in the most cases, if not, all, the governing law of foreign arbitration is domestic country law.

Bibliography

Books

Abdurrahman, O.A. *History and Development of the Law of Contract in Sudan*, 1898-2000, (Khartoum University Press, 2004)

Abosamra, M.T. *Arbitration in Boot, Sudanese Law Reform*, (Khartoum, *Al-Daar Al-Sudania* 2005)

Abu Al Wafa, A.A., *Optional and Compulsory Arbitration – on the nullity of Arbitration Agreement Signed by Minor*, (3rd Edition, Cairo, *Daar El-Fakir* 2009)

Adam, M.M. *Enforcement of Foreign Judgments in the Sudan*, (Khartoum, Dr Adam & Associates May 2015)

Adam, S. *Jurisdictional Problems in International Commercial Arbitration, (*Publications of the Swiss Institute of Comparative Law, 1990)

Al Astal, I. *Arbitration in Islamic Sharia Al-Bukhari in The Singular Literature*, (Cairo, Daar AL fikr Arabia, 1979)

Al Haddad, M.O. *The Intervention of the Sudanese Judiciary in Arbitration* Assistance and Supervision, (Khartoum, Dar El-Nahir press 2017)

Al Khair G. *The Difference between Arbitration Methods for Settlement of International Disputes*, (University Institute for Studies, Publication and Distribution, 1st Edition, 1999)

Al Mimari, M. *Commercial Arbitration & National Courts Intervention*, (Cairo, Daar Al-Nahada A-lmasrya 2014)

Al Minshawi, A.H. *Arbitration in Internal and International Special Relations* (3rd edition, Cairo, *Daar AL fiker AL arbi,* 2010)

Al Mmokhlafi, M.A. 'Importance and Role of International Commercial Arbitration', Journal of Arabic Arbitration, issued by the Secretariat General of the Arab Association for International Commercial Arbitration, 2nd edn (2000)

Al Razzaq, A. and al-Sanhuri, A. *Sources of Law in the Moslems Fight*, (Cairo, Daar ALFikir ALarbya 1988

Al Salahi, A.A.B.N. *Legal System of the International Commercial Arbitration*, (University Institute for Yemeni Researches and Studies 2009)

Al Sayed, H., *The Signed Contract between Countries and Foreign Persons*, (1st edn. Cairo, Dar Al Nahda Al-Masrya, 1996)

Alvarez. H.C., *Arbitration under the North American Free Trade Agreement*. (2nd edn, The Hague, Kluwer Law International, 2000)

Amir ibn, A., *Kitāb al-Idāh*, (Beirut, AL-Nahdaa Press 1971)

Anderson, J.N.D. *Islamic Law in the Modern World.* (New York, New York University Press, 1975)

Anderson, J. and Dalrymple, N. *The Modernisation of Islamic Law in the Sudan,* (New York, New York University Press. 1960)

Arfazadeh, B. H. *The Public Policy of the Fund and the Annulment of International Arbitral Awards in Switzerland,* (RSDIE 1995)

Atiya, A. *Kuwaiti Arbitration Law, Study of Internal Arbitration Law Rules under Kuwaiti Procedures Law* (Cairo Daar AL Nhada AL - Arabia 2012)

Awooda, A.B.A. *Enforcement of Foreign Judgments and its Effect,* (Khartoum University Press 2013)

Baamir, A.Y. *Shari'a Law in Commercial and Banking Arbitration, Law and Practice in Saudi Arabia,* (Riyadh University Press 2010)

Bairid K. and Zatel D. *Interest-Rate Caps in International Financing Transactions,* (Bagdad Newsletter CI the RA 11. King Lon Conatitte 2013)

Barakat S. M., *Enforcement of Foreign Judgments in the Sudan*, (Khartoum, Al-Daar Al-Sudania 2015)

Barbara, M.M. *International Commercial Arbitration,* (2nd edn, Daar Al Nahda al Arabiya, 1999)

Baron, P.M. and Linegr, S. *A Second Look at Arbitrability, Approaches to Arbitration in the United States and Switzerland.* (Oxford University Press, 2013)

Paulson, J. 'The Idea of Arbitration', (Arbitration International, vol 19, issue 1, 1 March 2003, 27-54)

Berger, M.S. L *Sharia, and Public Policy in Egyptian Family Law,* (University of Amsterdam Press 2005)

Bishop, R.D., Crawford J. and Reisman, W.M. *Foreign Investment Disputes: Cases, Materials and Commentary*, (2nd Edition, Kluwer Law International 2005)

Blackaby, N. Redfern, A. and Hunter, M., *International Arbitration*. (5th edition Oxford University Press, 2009)

Blackaby N. Redfern A. and Hunter M., *International Arbitration* (Oxford University Press, 2015)

Blake, S, Browne J and Sime S, *Practical Approach to Alternative Dispute Resolution* (3rd Edition, Oxford University Press 2014)

Blessing, M. *'Mandatory Rules of Law versus Party Autonomy in International Arbitration*', (Kluwer Law International 1997)

Born, G, *International Commercial Arbitration,* (Kluwer Law International, 2014)

Born G, *International Commercial Arbitration,* (London, Kluwer International Law, 3rd edn 2009)

Born, G. *International Commercial Arbitration: Commentary and Materials* (London, Kluwer Law International 2001)

Brekoulakis, S.L. *Arbitrability: International and Comparative Perspectives*, (Kluwer Law International, 2009)

Cahillane, L., *Legal Research Methods: Principles and Practicalities,* (Clarus Press Ltd, 2016)

Carlton, K.S. *Theory of the Arbitration Process*, (Published by the Harvard Law Review Association, 1972)

Carter P. B. *The Role of Public Policy in English Private International Law*, (Cambridge University Press, 1993)

Chatterjee, C. *Methods of Research in Law*, (2nd Edition, Old Bailey Press 2000).

Chukwumerije, O., *Choice of Law in International Commercial Arbitration,* (1st edn Quorum Books, 1994)

Clark, L., *State Law as Islamic Law in Modern Egypt*, (Brill, 2006),

Craig, L., Park, W., Paulsson, J., *International Chambers of Commerce Arbitration*, (2nd edn, Oxford University Press 1990)

Dalloz, R., *Sirey de doctrine, de jurisprudence, et de legislation*, (Jurisprudence Générale Dalloz I948)

Daly, M.W. *Empire on the Nile,* (1st edn, Cambridge University Press, 1986)

Daly, M.W. *Empire on the Nile: The Anglo-Egyptian Sudan, 1898-1934*, (Cambridge University Press, 2004)

de Boisson M. *Le Droit francais de L, arbitrage international* (GLN Joly 1990)

Delaume, G.R., *The ICSID Arbitration, and the Courts*, (Cambridge University Press, 1983).

De Lint, W. "*Police Authority in Liberal-Consent Democracies: A Case for Anti-Authoritarian Cops."* (in Oxford Handbook on Police and Policing, eds by Reisig M.D. and Kane R.J. 2014)

Collins A.C. and Harris J. *Dicey and Morris, The Conflicts of Laws*, (13the edn, Sweet and Maxwell, 2000)

Draig, I.M. *Internal & International Arbitration*, (Khartoum, Daar AL- Nashir 2014)

Draig, I.M. *Presentation of Solutions to the Problems of Practical Application of the Arbitration Act 2016*, (Khartoum, El-dar El-Sudaina Press 2017)

Draig, I.M. *Explanation of Arbitration Law 2016*, (Khartoum, AL Daar AL Sudaniya 1st.Edition, 2017)

Edris, K. *Practical and Legal Structure and Monetary Vision in Arbitration Act 2005*, (Khartoum, Al-Daar AL-Sudaia, 2006)

Elias, N. *The Civilizing Process*, (2nd edn, Wiley-Blackwell, 2000)

Eljaali, A.E.E. *Sudan Arbitration Law 2005 and Need for Reform.* (AL-Daar AL-Sudania 2013)

El Mahdi, A. and Saeed M. A., *A General Survey of the Sudan Civil Justice Ordinance 1900*, (Daar El-Nashir Publishers, 1969)

El Nur, M.I. *The Role of the Native Courts in the Administration of Justice in the Sudan*, (Library of the Ministry of Justice Press, Khartoum 1960)

El Sheikh, F.E.R., *The Legal Regime of Foreign Private Investment in Sudan and Saudi Arbitrations*, (Cambridge University Press 2009)

Farah, M. A. *The Necessary Substantive rules for an Arbitral Award*, (Khartoum University Press 2017)

Fawzi M. S. - *International Commercial Arbitration*, (5th edn. Dar AL Thaghafa Library for Publication and Distribution, 2013)

Fawzi, M. S. *International Commercial Arbitration, Comparative*, (Kluwer International 2009)

Fawzi M. S., *International Commercial Arbitration*, (5the edn, Daar AL Thaghafa Library for publication and Distribution, 2011)

Fouchard, B., Gaillard E. and Savage, J. *International Commercial Arbitration*, (Kluwer Law International 1999)

Fouchard B. Gaillard E and Goldman, C. *On International Commercial Arbitration, 'Arbitrability: Current Trends in Europe*', (Kluwer Law International 1996)

Hamid El-Ahdab, A., *Arbitration with the Arab Countries*, (3rd edn, Kluwer Law International 2011)

Hashim, M. *The General Theory of Arbitration*, (Cairo, Daar al-Fikir AL Arabi, 2011)

Henderson, K.D.D, *Laws of the Sudan*, (Cambridge University Press, British library vol. 1, Title 1, Subtitle 23rd edition, 1940)

Hodgkin, T. *Nationalism in Colonial Africa*, New York, Publisher: Muller, London 1962)

Holtzmann H.M. and Neuhaus, J. A *Guide to the UINCITRAL Model Law on International Commercial Arbitration: Legislative and Commentary*, (Kluwer Law International 1989)

Houin, R. *Archives of Philosophy of Law* (HAL Paris Nanterre Press 1954)

Humayd, A.A.; Al-'Uqud, F.U.S.I. (Beirut. *AL-Nahdaa Press*, 2009)

Hunter, M. A. and Martin, H *Law and practice of International Commercial Arbitration*, (Sweet & Maxwell, 1991)

Ibrahim A. I., *Special International Arbitratio*n, (3rd edn, Daar Alnasher., 2000)

Izaldin A., *International Private Law*, (2nd edn, University of Al-Nileen Library Press, 2004)

Jackson, D. "Mandatory Rules and Rules of 'Ordre Public'", in North, P. (Ed) "*Contract Conflicts, the EEC Convention on the Law Applicable to Contractual Obligations. A Comparative Stud*y" (Oxford University Press, 1982)

Jarvin, S, *Objections to Jurisdictions in Newman*, (2nd edn, Juries Publishing, 2008)

Lew, J.D.M. "*Applicable Law in International Commercial Arbitration*: 'A Study in Commercial Arbitration Awards" (Oceana Publications, 1978)

Lew J.D.M. and Kroll, S., *Comparative International Arbitration*, (Kluwer Law International, 2003

Liebesny, H. J. *the Law of Near Middle East States* (University of New York Press, 1975)

Lutz O. *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan*, (Ashgate Publishing, Ltd., 2013)

Malkawi, A *Using Alternative Dispute Resolution Methods to Resolve Intellectual Property Disputes in Jordan*, (Published by CWSL Scholarly Commons, 2012)

Mansour, I. *The Lesan al-Arab*, (published by the General Egyptian Institution 2015)

Mistelis L.A. & Lew J.D.M. (Eds) *Pervasive Problems in International Arbitration* (Kluwer Law International, 2006)

Mullerat, B.R., *Arbitration and Competition Law - A Basic Summary of the Debate* (Periodo de Publicación Recogido, 2011)

Murugasarnpilla.V.A. *The Recognition and Enforcement of the Foreign Arbitral Judgment in Sudan* (London, publisher S.L.J.R. 1969)

Mustill J. and Boyd S.C. *Commercial Arbitration*, (2nd edn, LNUK, 1989)

Niboyet, J.P. *Principles of Private International Law*, (Recueil Sirey, 1949)

North P. and Fawcett, J.J. *Chesire and North's Private International Law*, (13th edn, Butterworths 1999)

Nygh, P. *Autonomy in International Contracts,* (Clarendon Press 1999)

Ogot, B. A., "*The Sudan, 1500–1800*", *General History of Africa* (2nd edn, University of California Press 1999)

Osman, H.M., *Recognition and Enforcement of Foreign Judgments and Arbitral Awards in Sudan,* (Khartoum University Press 1999).

Park, W.W., *Arbitration of International Business Disputes*, (2nd edn, Oxford University Press 2012)

Park,W.W., *National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration,* (University of Georgia Press 1989)

Paulson, J.M. *The Idea of Arbitration* (Oxford University Press, 2013)

Paulson, J. '*The Case for Disregarding Local Standard under the New York Convention* (Columbia University Press, 1996)

Radwan, A.Z. *the General Principles in international commercial Arbitration*. (1st edn, *Daar ALNahda Al-Masrya* 1981)

Redfern A. and Hunter, M. *International Arbitration*, (6th edn, Sweet & Maxwell 2015)

Redfern A. and Hunter M., *Law and Practice of International Commercial Arbitration*, (4th edn, Kluwer Law International, 2004)

Redfern A. and Hunter, M. *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell 2004)

Redfern A. & Hunter, M. *Law and Practice of International Commercial Arbitration* (2nd Edition. London, Sweet & Maxwell, 1991)

Reisberg, S.H. *The Rules Governing Who Decides Jurisdictional Issues: First Options v. Kaplan Revisited*' (2009)

Reisman, W. *Systems of Control in International Adjudication and Arbitration* (Duke University Press 1992)

Rjoo, S. *Law, Practice and Procedure of Arbitration* (2nd edn, Lexis Nexis 2017)

Roebuck, D. *Sources for the History of Arbitration: A Bibliographical Introduction*, (Oxford University Press 1998)

Rossani, J.M. *Arbitration National and International*, *progression*, (Brazil, Del Rey Publishers, 2007)

Sadig, H.A., *The Conflict of International Judiciary Jurisdiction*, (Khartoum University Press 1994)

Saieh, S. *Unlawful Gain and legitimate profit: Islamic law*, (2nd edn, Kluwer Law International, 1992)

Saleh, S. *Commercial Arbitration in the Arab Middle East*, (2nd edn, Lexgulf Publishers Ltd; 2011)

Saleh, S. *the Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East*" (Brill 1985)

Schreuer, C.H *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2001),

Seppälä, C. *Comment on Section 2 of the Swedish Arbitration Act of 1999 dealing with the Right of Arbitrators to Rule on their Jurisdiction*, (Lars Heuman & Sigvard Jarvin, 2006).

Shafieg, M. *International Commercial Arbitration*, (Cairo, Daar Al-Nahda 2011)

Shafieg, M. *International Commercial Arbitration* (A study in the Law of International Commerce, Dar Al Nahda Al Arabiya 2015)

Shebaika, M. *The Sudan over the Centuries*, '*Al-Sudan Abr A1-Quroon'*, (2nd edn, Dra El-Nasher. 1965)

Sheta, A. M. A. B *The Arbitration an Explanatory and Comparative Study of Judicial Provision & Arab and International Arbitration Institute* (3rd edn, Daar AL Nahda Al-Arabiya 2009)

Sklenyte, A. *International Arbitration: The Doctrine of Separability and Competence Principle*, (published in http://docplayer.net/ 2003)

Sutton, D. St.J'n, Kendall, J. Gill, J. *Russell on Arbitration*, (21st edn, Sweet & Maxwell, 1997)

Taniguchi, Y. '*Enforcement in Action: Theoretical and Practical Problems*,' ICCA Congress Series no 9. (Kluwer Law International, 2003)

Tweeddale K. & Tweeddale, A. *A Practical Approach to Arbitration Law*, (Blackstone Press Limited, 1999)

van den Berg AJ, Final Award, *Yearbook Commercial Arbitration*, (Walters Kluwer Law & Business, 2014)

van den Berg, AJ, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation,* (Kluwer Law International 1994)

van den Berg, A. J. *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation,* (Kluwer Law International, 1981)

West, L.C. '*Award Enforcement Provision of the World Bank Convention*', (Bank of Korea, 1968)

Woodward, P. *Sudan, 1898-1989: The Unstable State,* (Lynne Rienner Publishers Inc. 1990)

Zaki M. *Opting Out of the Common Law: Recent Developments in the Legal System of the Sudan,* (Khartoum University Press 1973)

ARTICLES

Hussein A. Abualgasim, 'Issues Regarding Drafting the Arbitration Act 2005' Sudanese Judicial Judgment Journal, no.789 (2006)

Mohammed Al-Alam Abu Zaid, 'Comparing article (1) of the UNCITRAL Model Law, 'Scope of application' with article 8 of arbitration at 2005, Arbitration Agreement' Sudanese Judicial Judgment Magazine, no.796 (2006)

Ali Ibrahim AL Emam, 'Drafting and Naming of Provisions', Journal of Judicial Judgments no177 Khartoum (2002)

Sarah Saif Al-Islam Abbas, 'Revocation and Analysis Arbitration Act 2016' Journal of the Arbitration, Khartoum, no.2 (2017)

Homayoo N Arfazadeh, 'Arbitrability under the New York Convention: the Lex Fori Revisited Controversy' Arbitration International, vol 17 no 1 LCIA, (2001)

Baelz and Shahoud Almousa 'The Recognition and enforcement of the judgement and foreign arbitral award under the Riyadh Convention- thirty years of Arab Co-Operation.' International Journal Procedural Law Vol 4 No2 (2016)

Saad Badah, 'Grounds for Refusing Recognition and Enforcement of a Foreign Arbitral Award Which Was Set Aside Abroad' North Carolina Journal of International Law, vol. 41 issue 1, Fall 2015

Patrick M. Baron, Stefan Liniger 'A Second Look at Arbitrability: Approaches to Arbitration in the United States, Switzerland and Germany'. 07 October 2014, Arbitration International, Volume 19, Issue 1, 1 March 2003, Pages 27–54,

George A Bergmann, 'The "Gateway" Problem in International Commercial Arbitration' Yale Journal of International Law 37(1) (n 2) (2012)

Marshall J Breger and Shelby R Quast, 'International Commercial Arbitration:' Journal of International Law, vol. 32, and Iss. 2 (2000)

Charles Chatterjee and Anna Lefcovitch, in ‘Recognition and Enforcement of Arbitral Awards’ International in-house Counsel Journal vol.9, No, 36, (Summer 2016)

Adeline Chong, ‘The Public Policy and Mandatory Rules of Third Countries in International Contracts.’ Journal of Private International Law. (2006) 2, (1), 27-70

Richard J Coll, ‘Comment, United States Enforcement of Arbitral Awards against the Sovereign States: Implication of ICSID Convention.’ Harvard International Law Journal. (1976)

Antonios Dimitrakopoulos, 'Arbitration practice in the UAE', Arab Law Quarterly, Journal of Arabic arbitration 2nd edn, vol 16, vo 4,200186 (January 2000)

Hussein Mustafa Fathi, ‘Arbitration according to the Islamic Sharia’ Journal of Arabic Arbitration, 1st edn (2010)

J.P. Gaffney, ‘The Law Applicable to the Arbitration Agreement.’ International Arbitration Report, June 2004

E. Guttmann, ‘The Reception of Common Law in the Sudan,’ International and Comparative Law Quarterly, vol 6 July 1957

G. Mayew, & M. Morris, ‘Enforcement of Foreign Arbitration Awards in the United Arab Emirates.’ Defense Counsel Journal, 81(3), (2014)

Jan Kleinheisterkamp, 'The Impact of Internationally Mandatory Laws on the Educability of Arbitration Agreements’ LSE Law, Society and Economy Working Papers 22/2009 London School of Economics and Political Science Law Department [2009]

F. Kutty, ‘The Shari'a Factor in International Commercial Arbitration’ 28 Loy. L.A. International & Comparative Law, 2006

H. Mahassini, ‘General Principles of Islamic Law relating to International commercial arbitration.’ The ICC International Court of Arbitration Bulletin, Special Supplement, 21, 23(1992)

William W Park, ‘The Arbitrator's Jurisdiction to Determine Jurisdiction’ 13 ICCA Congress Series 55, Boston Univ. School of Law, Public Law Research Paper No. 17-33, (March 18, 2007).

A.Redfern and M. Hunter, ‘International Arbitration, International Arbitral Awards and Settlement Agreements', publisher JCI Arb 54, (1988)

Steven H. Reisberg, ‘The Rules Governing Who Decides Jurisdictional Issues: First Options v Kaplan Revisited.’ Juries legal information ARIA vol. 20, no. 2, 2009

Derek Roebuck, ‘Cleopatra Compromised: Arbitration in Egypt in the First Century’ Journal of the Chartered Institute of Arbitrators 74, no. 3, (2008)

A.Rogers and M. Kaley,'The Impact of Public Policy in International Commercial Arbitration Jornal of the Chartered Institute of Arbitrators' vo1.65, no 4. (2008)

John T.Schmit, 'Arbitration under the Auspices of the International Centre for settlement Of Investment Disputes (ICSID); Implantation of the Decision on Jurisdiction of Jamaica Inc v Government' Harvard Intternational Law.Journal vol 17 (1976)

Ibrahim F. I. Shihata, 'The Contribution of ICSID to the Settlement of Investment Disputes with a Particular Reference to Arab Countries, ICSID Review-Foreign Investment Law Journal' vol. 17, 1999, 299-361, at 316.

Ibrahim Q. Taha, 'Electronic Arbitration', Journal of the Arbitration, Khartoum, Ministry of Justice Press, no.2 (2017)

M.Tijani, 'International Trade in Arab Country' International Journal of Arab Arbitration, 1st edn, vol 6 (2014)

INTERNET SOURCES

Mulhim Hamad Alrnuhim ' The First Female Arbitrator in Saudi Arabia', (2016) Kluwer Arbitration. Aug 29, Http:/ /kluwerarbitrationblog.com/2016/08/29/the-first-female-arbitrator-in-saudi –Arabia accessed 21November 2017

Essam Al Tamimi. 'Enforcement of Foreign Arbitration Awards in the Middle East' http://www.tamimi.com/en/magazine/law-update/section-8/september-4/enforcement-of-foreign-arbitration-awards-in-the-middle-east.html accessed 13 November 2017

H. Arfazadeh, 'Arbitrability under the New York Convention: the Lex Fori Revisited.' https://www.law.columbia.edu/sites/default/files/microsites/columbia-arbitration-day/files/04_2001_-_arfazadeh.pdf accessed 27 January 2017

Bruce L Benson. : 'Applicable Law in International Commercial Arbitration- Arbitrarily' http://shodhganga.inflibnet.ac.in/bitstream/10603/28837/12/12_chapter%205.pdfat accessed 5 September 2017

George A. Bermann, 'The American Review of International Arbitration (ARIA)'(2008) at https://arbitrationlaw.com/library/introduction-mandatory-rules-law-international-arbitration-aria-vol-18-no-1-2-2007 accessed 6 February 2016

Alexander K.A. 'Greenawalt, Does International Arbitration Need a Mandatory Rules Method?' 18 Am. Rev. Int'l Arb. 103 (2007), http://digitalcommons.pace.edu/lawfaculty/828/ accessed 5 September 2017

F. Mann, 'Lex Facit Arbitrum", in International Arbitration. Liber amicorum for Martin Domke.' Nijhoff, (1967) [Reprinted under the title The UNCITRAL Model Law - Lex Facit Arbitrum in Arbitration International 2(3) 1986] https://stirling.rl.talis.com/link?url=http%3A%2F%2Fwww.kluwerarbitration.com.ezproxy.st

ir.ac.uk%2FCommonUI%2Fdocument.aspx%3Fid%3DIPN9730&sig=0a6c60eed5a920da14a060372211d65623eb47df2c6474ba94ff9d36e6248d1a accessed 27 November 2017

Albert Jan van den Berg, 'When Is an Arbitral Award Nondomestic under the New York Convention of 1958?' 6 Pace L. Rev. 25 (1985) https://digitalcommons.pace.edu/plr/vol6/iss1/2 accessed 10 May 2016

Earl S. Wolaver, 'The Historical background of Commercial Arbitration' https://scholarship.law.upenn.edu/penn_law_review/vol83/iss2/2 (1934) accessed 21 March 2016

CONFERENCE/ SEMINARS PAPERS

Charles Manzoni, Seminar paper: 'International Arbitration the Key Elements', (Presentation at 39 Essex Street- London, 5th May 2004)

Ibrahim Draig, the seminar held in Khartoum. ('In the light of new Arbitration Law. 'Organised by Khartoum University, November 2005).

Motasim Hassan Muhagob, ('Enforcement of Arbitral Awards', paper delivered on a conference held in Khartoum University) 10 August 2016.

Suraj Abu Zeid, ('Arbitration in Petroleum Contracts - A memorandum prepared by An Introduction of the Advanced Session for Preparation of the Arbitration', Seminar at Erin Shams Law Arbitration Centre September/October 2001).

The Chancellor / Husain Awad. ('Abualgasim' Seminar held by the department of the legislation – the Ministry of Justice - on the light of the New Arbitration Act 2005, Khartoum 22 May 2005).

Youssef H. Fadul , ('Sudanese Identity, Features and Roots: Remarks on its Development and Vision of its Future', Seminar held in Khartoum, in Al-Ez Ibn Abdul Salam Centre for Arab, Islamic and African Studies, May 2014)

ARABIC TEXTS

Amir I. al-Shamakhi, Kitāb al-Idāh, (1st edn, Beirut, AL maktaba Al- Watatniya 1971),

Al-Hārithi, 'A. Humayd, Al-'Uqud al-Fiddiyya fil Usul al-Ibadiyya,

Holly Qur'an, Surat AL Nisaa - Verse 35.

Holly Qur'an, Surat AL Nisaa - Verse 58.

Holy Qur'an Verse 35 of the Sura Al Nisa- explains the Arbitration Agreement

Holley Qur'an Ayah 65' in the same verses 'Sura AL-Nisa

Holley Qur'n in Surat (Sad) Ayah 22

Hadith, Sahih Bukhari and Muslim, Volume 003, Book 050, Hadith Number 874.

Hadith, Narrated by Ahmad and Abu Daoud and al-Tirtnidlli Hadith Number 878.

Holly Qur'an Verse 62 Surat AL Ilugrat

Holy Quran Surat Almaid veres 51

Holy Quran Surat l-māidah veres 1

TABLE OF CASES

Alcoa Minerals of Jamaica, Inc. v. Jamaica (ICSID Case No ARB/74/2), 1975 (Decision on Jurisdiction and Competence of July 6, 1975)

African Integrated Investment Group Co., Ltd. v. Burhan Rashid and Hani Matoug No; M A/TM//624 2001 (Sudanese Appeal of Court 3 May 2001)

Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1, *May 1986)*

Adams v Cape Industries plc [1990] Ch. 433 at 552 (English Court of Appeal 2 June 1990)

Astro Nusantara International BV and others v Pt Ayunda Prima Mitra and others, CACV 272/2015 (Hong Kong, Court of Appeal, / 05 December 2016)

Agrovenus LLP v Pacific Inter-Link Sdn Bhd (2014) (16 August 2018 / United States, U.S. District Court, Western District of North Carolina)

Aloe Vera of America, Inc. v Asianic Food (S) Pie Ltd 120061 3 SLR(R) 174 (Singapore High Court 30 Jun 2010)

Amin Abdel Maseeh & Sons v. Manoli Chadzoghlu & Sons. (1962) S.L.J.R.251. (Sudan Court of Appeal 30 June 1962)

*Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich [*2003] 1 UKPC 11. (English Privy Council: 29 January 2003)

Antram v Chace (1812) 15 East 209

Bremer Handels GmbH v Deutsch Conti- Handels GmbH (interest) 1984 2 Lloyds's Rep 121. The Germany Court of Appeal 1984)

Baroness Hale of Richmond in GiIlies v Secretary of State for Work and Pensions: [2006] UKHL 2, [2006] 1 All ER 731 (English, Appellate Committee 26 JANUARY 2006)

Baxter International v. Abbott Laboratories 315 F.3d163 [2004] (the United States, Court of Appeals, Seventh Circuit. Decided: January 16, 2003)

Buyer (PR China) v Seller (Germany) (2008) XXXIII Yearbook CA 495 (Germany, Court of Appeal 2004)

Bremer Vulkan Schiffbau and Maschinenfabrik v. South India Shipping Corporation Ltd [1979] 2 WLR I41 C.A. (3 June 1981)

Beximco Pharmaceuticals Ltd and others v Shamil Bank of Bahrain EC [2004] EWCA Civ 19 (C.A., 28 January 2004)

Birtley & District Co-operative Society Ltd is Windy Nook & District Industrial Co-operative (1960) 2. Q.3.AC.532 C.A. (1961)

Bache v. Billingham [1894] 1 Q.B. 107; 69 L.T. 648, C.A. (South African High Court, Lobatse 1898)

AT & T Corps v Saudi Cabk Co [2000] 2 Lloyd's Rep 127, CA (15th May 2000)

Caledonian Railway Co v. Turcan [1898] AC 256. C.A. (1999)

Case No.AM 1019 of 23p, issued at 09/11/1994 session, (unpublished circular). Sudanese High Court Decision No 1019, 8 November 1994)

Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, (May 1999) ICSID / ARB/97/4

Camerounaise des Engrais (ICSID) Case No. ARB/81/2) May 3, 1985

Chromallog Aeroservices v. The Arab Republic of Egypt (939F Soil) G07 (DDC.1996) U.S. District Court for the District of Columbia - 939 F. Supp. 907, 31 July 1996.

China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd 1992 No. MP 2411 (Hong Kong, High Court, In the Supreme Court of Hong Kong 13 July 1994)

Dab' Dr Muhammad Ridzuan bin Mohd Salleh v Syarikat Air Terengganu Sdn Bhd [2012] 3 MU 737. (Malaysia High Court 2 October 2012)

Deutsche Schachtbau- und Tiefbohrgesellschaft MBH and Others v. Shell International Petroleum Co. Ltd, [1990] AC 295at 316, 322, CA (United Kingdom: House of Lords Judgment, by Existing Order of Foreign Court, June 23, 1988)

Esmat Abdul Gabbar Mohamed & Another v. Farid Abdul Gabbar Mohemed, SC-REV-996-1995 (1995) SLJR 158 (Sudanese Appeal of Court 6 June 1996)

Ellis Mechanical Services Ltd v Wates Construction Ltd. (1976) 2 BLR 57, C.A., Civil Division, December (1976)

E. B. Aaby's Rederi A/S v. Union of India (The Evje) [1972] 2 Lloyd's Rep. 129 England, Queen's Bench Division (Commercial Court) May 1972)

Future Heritage Sdn Bhd v Intelek Timur Sdn Bhd. Malaysia (2001) 6 MlJ 727 (Kuala Lumpur Court of Appeal - Civil Appeal 1 November 2002)

Fakes v Taylor Woodrow [1973] 1 All ER 670,

The Elizabeth H [1962] 1 Lloyd's Rep 172 (1974)

Forest Electricity Corporation v HCB Contractors (1995) WL 37586, *3 (ED Pa 1995), (US District Court, E.D. Pennsylvania, 30 January 1995

Fional Trust& Holding v.Privalov EWCA Civ 20 (2007)

Fougerolle SA (France) v. Ministry of Defense of the Syrian Arab Republic. Yearbook XV (1990) pp. 515-517 (Syria no. 1) (Administrative Tribunal, Damascus, 31 March 1988)

Fillite (Runcorn) Ltd v Aqua-Lift (A Firm). (1989) 45 Blr 27 C.A. (1989)

G. Ramachandra Reddy and Co. v. Chief Engineer, AIR 1994 SC 2381 (India High Court, February 1994)

Government of Gibraltar v Kenny [1956] 2 QB 410

Government du Pakistan v Societe Dallah Real Estate and Tourism Holding Co. Paris Court &Apel, 17 February 2011 {12012} Rev Arb 369 (English Supreme Court, 3 November 2010)

Government of the Sudan v. Brown International Inc. C.A-CS.97.1968 (Unpublished) (Sudanese High Court, 6 April 1968)

Hatton v Boyle (1858) 3 H & N 500;

Hodgkinson v. Fernie (1857) 3 C. B. (N. S.) 189 34 (English Court of Appeal, 1957)

Heyman v Darwins Limited: HL 1942 AC 356, [1942] 1 All ER 337

Huda A. Abu Arki v. Abdullah M. Amin no MA | SC m | 2370 | (Sudanese Court of Appeal in 2006)

Iron & Steel Co. Ltd. v. Tiwari Road Lines, (2007) 5 SCC 703. English Court of Appeal Judgment civil appeal no. 2386 of 2007)

Lukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942) (case opinion from the US Court of Appeals for the Second Circuit, March 2, 1942) 515

Inter Tread Co. v ATCO Co, No. RB | 210 | 2006 (Sudanese Court of Appeal 9 September 2006)

International Bulk Shipping & Services Ltd v Minerals & Metals Trading Corp of India [1996] 1 All ER 1017, CA (Eng.) (England High Court (Commercial Court), 3 September 1996)

Imperial Gas Light and Coke Co v Broadbent, 11 E.R. 239; 7 H.L. Case 600, (1859)

John Fairweather v. Gabriel Gabrielieds S.L.J.R.22 (1998) A.C.122 Sudan High Court December 1988).

Jugoslanska Oceanska v P lovidba a Castle Investment Co Inc. 119741 QB 292, (1973) 1 3 All ER 498, (1973)

Klöckner Industrie-Anlagen GmbH and others v The United Republic of Cameroon and Société (6 July 1975), 1 ICSID Reports 296

Kelana Erat Sdn Bhd v Niche Properties Sdn Bhd (2012) 5 MLJ 809 at 60 (Malaysia High Court 2 February 2012)

Locklear Automotive Group, Inc. v. Hubbard, 2017 WL 4324852 (The US, the Supreme Court of Alabama Sept. 29, 2017)

Livingston v Ralli 10 [1855] 5EL &BL 132 (English Court of Appeal 1855)

Mohamed Abdullah Abdul Majeed v. Habib Mohamed (1986) 1 MI] 526;(Sudanese High Court August 1986)

Morgan v. Mather [1927] 2 Ves. The US, **(**the US Supreme Court, Jun. 15. 1927)

Mitsubishi Motors Corporation v Soler Chrysler Plymouth Inc. 473 US 614, 105 S.Ct 3346 (1985), (the US, The Supreme Court Decided July 2, 1985)

Minmetals Germany v Ferco Steel Vol XX 1 V (1999) Yearbook Commercial Arbitration (England and Wales, High Court 20 January 1999)

Malayan Flour Mill v. Raja Lope & Tan Really Co. (2000) 6MLJ591 (The High Court of Singapore, 20 June 2000)

Mitchell v. Lath, 160 N.E. 646, 247 N.Y. 377 (New York Court of Appeals Filed: February 14th, 1928)

Mark Wood, Bart v. Edmund Griffith, [8. C. 1 Wils Ch. 34, (US, District Court, Feb. 10, [1818] .

Nova (Jersey) Knit Ltd. v. Kammgam Spinnerei GmbH [1977] 2 All ER 463, (England House of Lords 16 February 1977)

Oppenheim & Co v Mohamed Haneef (1922) I AC 482 (India High Court, 7 May 1922)

PacifiCare Health Sys Inc. v Book 538 U.S. 401 (2003) (The United States Court of Appeals for the Eleventh Circuit, April 7, 2003)

Paint Webber Inc v. Mohammad S. Elabi 87 F 3d (1996)

Parsons and Whittemore Overseas Co. Inc v Societe Generale dei'lndustrie du Papier (RAKATA) 508F 2d969 (2dCir.1974) (United States Circuit Court 1974)

Proved Miliangos v George Fran (1976) AC 443,119751 3 All ER 801, (1976)1 Lloyd's Rep 201, HL

Pitcher v Rigby (1821) 9 Price 79; (England decision of the House of Lords 1821)

Photopaint v. Smartlens, 335 F.3d 152 (2d Cir. 2003); (United States District Court Northern District Of New York Judgment Of 8 March 1988)

Republic of Ecuador v Chevron Texaco Corp., 426 F. Supp. 2d 159 (S.D.N.Y. 2006) (hereinafter ROE II) (District Court, S.D New York June 19th, 2007)

Rite Approach Group Ltd. v. Rosoboronexport, (2005) 1 SCC (Supreme Court of India 16 November 2005)

Rail World LLC and others v. Republic of Estonia ICSID Case No ARB/06/6, 5 February 2007,

Round v. Hatton, (1843) 10 M. & W. 660; 2 Dowl (N. S.) 446; 12 L. J. Ex. 7 (United States District Court)

Robertson v. Hatton, (1857) 26 L. J. Ex. 293 23, 286, 297 (1857)

Re Corporation Transnational de Inversions SA de CV at al v STET International SpA et al 119991CanLII 148 19 (ON SC) (Ontario Superior Court of Justice Lax J. 22 September 1999)

Renusagar Power Co.Ltd (India) v General Electric Co. (US) (1995) XXYBCA681 (Bombay High Court 12 October, 1989)

Rosseel NV v, Oriental Commercial and Shipping (UK) Ltd [1990] 3 All ER 545. C Inc Plc v L & Another (England and Wales High Court (Commercial Court) May 1990)

Smart Systems Technologies, Inc. v. Domotique Secant, Inc. Case No. QJ 14742 (Court of Appeals of Quebec, Canada 5 October 2005)

Saudi Arabia v. Arabian American Oil Company (Aramco). (1954) (The United States Arbitration Tribunal 23 August 1958)

Sudanese Tractor Co. LTD v. the Ministry of Finance and Planning /Constitution Court No. MA/TM/592/2015 (Sudanese, High Court 6 Mars 2015)

Sol International Ltd v Guangzhou Dong-Jun Real Estate Investment Co Ltd [1988] 3 HKC 493

Sociétés Sofidif v OIAETI, (1989) Rev. arb. 481(French Cour de cassation civ. Le 1989)

S. Rajan v. the State of Kerala, (1992) 3 SCC 608 Supreme Court of India, 29 July 1992

Sudan Cotton Co Ltd. v. Mutacot International Trade Co, Ltd, Khartoum (2014) N674 Sudanese High Court December 2014)

Saxmere Company Ltd v Wood Board (2009) NZSC72, (Appeal Court of Zealand, 03 July 2009)

Sundra Rajoo v Mohamed Abd Majed (2011) 6 CLJ 923 at [lO(d)]. Malaysia High Court June 2011)

Soleimany v Soleimany (1999] QB 785 (England Court of Appeal, 7 May 1999)

Samick Lines Co Ltd v Owners of The Antonis P Lemos HL [1985] AC 711

Salini Costruttori S.p.A. and Italstrade S.P. A. v. The Kingdom of Morocco, (2002) ICSID Case No. ARB/00/4, Decision on Jurisdiction (2002)

State Government of Sarawak v. China Hint Engineering Development Co (1995) 3 MI] 237 (Malaysia Court of Appeal 7 Mares 1995)

Swinford v. Burn (1818) Gow 5; (US District Court of Dallas 1818)

Smith v Trowsdale (1854) 9 App CAS 605 (England Court of Appeal October 1954)

Tehno-Impex v Gebr Vett Wilson and Green Van Weelde Scheepvartkantoor BV. (1981) QB 648, (1981) 2 All ER 669.

Thomas v Atherton (1878) 10 ChD 185.

Tasarruf Mevduati Sigorta Fonu v Demirel and another [2007] EWCA Civ 799

Thorburn v. Barnes (1986) LRCP384, US District Court 1986)

Union of India v LB v. aby's Rederi A/S (1975) Ac797 (India High Court 1975)

Walshaw v. Brighouse Corp (1988) 2QB 286